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Jos Hemphill

A

TREATISE

ON THE

LAW OF DOWER;

PARTICULARLY WITH

A VIEW TO THE MODERN PRACTICE

OF

CONVEYANCING.

BY JOHN JAMES PARK,

OF LINCOLN'S INN, ESQ.

FROM THE LONDON EDITION.

PUBLISHED BY

JOHN S. LITTELL,

Law Bookseller and Publisher,

No. 11 GEORGE STREET,

PHILADELPHIA.

1836.

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1836

J. VAN COURT, PRINTER,
48 Market street.

RTF 28 May 53

ADVERTISEMENT.

The leading object of the following treatise is to exhibit the law of Dower in its application to the modern theory and practice of conveyancing. It is to Dower in its character of a dormant incumbrance, in a far greater degree than with a view to its remedial or possessory qualities, that the attention of the lawyer is called in the present state of practice, and that, therefore, the compiler has directed his more laborious efforts.

The present essay aims not only at economizing the time too often consumed by the practitioner in searching for obscure cases through a multiplicity of books, but also, where opportunity offers, at leading the mind of the student to the correct practical inferences arising from the mass of scattered law which is to be found on this subject. The writer is not unaware of the arduous nature of any attempt at this mode of treating it; and, he feels that much more might be done under extended advantages, than his very limited experience, and still more limited talents, would admit. He nevertheless relies with some confidence on the book, such as it is, being found practically useful.

It is, perhaps, one of the greatest advantages arising from the composition of distinct treatises on the different heads of law, that they afford an opportunity which even long practice scarcely supplies, of reducing an immense mass of isolated authorities and dicta, apparently acknowledging no higher origin than the *ita lex scripta est*, to something like scientific analysis, and induction; or at least, to what are usually called by lawyers, for want of a better term, first principles. The author must confess, that he cannot flatter himself with entire success in reconciling or systematising *all* the authorities upon Dower; but from the very nature of the complicated jurisprudence of this country, or rather of the mode in which it becomes accumulated, it is not to be expected that any application shall succeed in extracting from so homogeneous a material, a system consistent and intelligible in all its parts, on any given subject. It may perhaps even admit of a doubt, whether the possession of extraordinary powers of discrimination, and great command of knowledge, has not led some or our most valuable legal writers into too systematic a refinement, by referring cases to principles, and reconciling them upon distinctions, which were never dreamt of by the judges who decided them, and the inconvenience of which is, that it is making the law speak one language in the books, and another in the treatises.

It might perhaps have been expected, that a treatise on Dower should embrace the law of Jointures, and Equitable Satisfactions; but the writer found the subject too extensive to be comprehended within a

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subordinate head, at the same time that it was wholly unconnected with, and unillustrative of, the general law of Dower. He has the less concern at excluding it, from the consideration that it has been already treated of with much attention, in several late compilations.

Could the writer persuade himself that the elucidation of a single point of practical occurrence would be assisted by any historical discussion of the origin and progress of the legal provision in question, whether in this or foreign countries, he would not have thought any space appropriated to that purpose misapplied. But looking at it, as he does after habitual recurrence to the subject, as matter of mere antiquarian learning, wholly inapplicable to any purpose of practical utility, he feels that he should be sacrificing too much to method and to usage, by devoting any part of the following pages to such disquisitions; impressed as he is with the acute remark of Mr. FEARNE (though without any adoption of its concealed personality,) that these and many similar inquiries "may be left to the investigation of erudite curiosity, or the representations of prolific ingenuity, without much concern to those whose only interest in the subject rests on the calls of their professional attention to the practical application of the rules of law at this day."(*a*)

The many who are acquainted with the stupendous acquirements of Mr. PRESTON, as a property lawyer, and the few who might chance to have known that the professional studies of the compiler of these pages were pursued under his auspices, might have found no cause of surprise if a treatise on one of the recondite heads of the law of real property had sought the protection of a gentleman, who, probably, of all men living, is most competent to judge whether that protection could have been deservedly bestowed. That the author has declined inscribing his book with the sanction of that, or any other accredited name, is neither because he is less sensible of professional talents than other men, or that he should be more scrupulous in the acknowledgement of personal kindness, where he might have been fortunate enough to be the subject of it; but he is desirous rather to commit his book, in the spirit of candour, to the simple test of practical utility, than to become the candidate for bespoken credit. If it should have the good fortune to obtain approbation, he will be enabled, without undue assumption, to accept it as the reward of his own industry; and if it should fail, he will involve no worthier name in the reproach of patronizing that which was not deserving of it.

J. J. P.

(*a*) Cont. Rem. 185, 6th edit.

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A

TREATISE ON DOWER.

CHAPTER I.

Introductory Observations.

In the instance of the legal provision now under consideration, its remote history, as furnished by antiquaries, throws no light, even to the profound lawyer, upon the practical consideration of the subject. The doctrinal peculiarities attaching to the interest in real property called Dower, and their application to the circumstances of modern practice, are exclusively referrible to an order of things terminating in the principles of the common law of England. Even the ingenious attempt of Chief Baron Gilbert to elucidate the law of Dower, by reference to the circumstances of feudal tenure,(*a*) is but little calculated to convey any real satisfaction to the mind of the practical lawyer; or, with the exception of very few points, to give intelligence to his general conceptions on this head of property law. In a treatise pretending to no higher character than that of practical utility, it seems enough *therefore to refer the curious to the discussions concerning the origin and history of Dower in foreign countries, and of its introduction into this, which are to be found in the works referred to below.(*b*) [*2]

It should however be noticed, as a circumstance occasionally exercising an influence in comparatively modern decisions, that from the earliest periods of the existence of the common law in this country, a very extraordinary degree of favour was bestowed, in the administration of justice, on this provision for the support of a wife surviving her husband. The vigilance of the courts, in watching over her interests, is very amply displayed in the Year Books and other early reports. Dower was, indeed, proverbially the foster-child of the law, and so highly was it rated in the catalogue of social rights, as to be placed in the same scale of importance with liberty and life. *Favorabilia in lege sunt, vita, fiscus, dos, libertas*, was the maxim in the courts; and is frequently cited by the old text writers and reporters.(*c*) At this day, when the

(*a*) See the tract on Dower appended to Gilbert on Uses.

(*b*) 1 Crui. Dig. 2d ed. 174; 2 Bl. Com. 129, 133; Prest. on Est. Ch. 'Dower;' Rob. Gavelk. 159; Gilb. on Uses, 354, et seq.; 2 Bac. Abr. 356.

(*c*) "The tenant in Dower (says Lord Bacon) is so much favoured, as that it is the common by-word in the law, that the law favoureth three things; 1. Life; 2. Liberty; 3. Dower." Reading on Uses, 37; and see Jenk. cent. 1. ca. 87; cent. 7. ca. 15; Cro. Jac. 111; 9 Co. 17 *b.*; Eng. Lutw. 227; 1 Keb. 86.

existence of Dower is rarely adverted to even by professional men, in any other light than as a dormant incumbrance on a title, it is difficult altogether to recognise the coherency of the proposition; but considering
[*3] the age referred to as one in which the *domestic affections do not appear to have been so uniform in their action as in later times, and in which the capacity of making a testamentary provision for the wife out of the real estate did not even exist, while the personal property of the most wealthy was comparatively trifling, the necessity of keeping a watchful eye over the only certain resource of widowhood is strongly indicated. (*d*)

In modern times, many causes have tended to diminish the popularity of this legal provision. Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty, and the domestic affections, afford a surer pledge among the virtuous than positive institutions. But a more general reason for disfavour has arisen in the increased expense occasioned by the attachment of the title of Dower in all cases where real property is to be pledged, or converted into money, in the way of sale or mortgage. In the multifarious transactions of modern times, this becomes an object of no slight consideration; and in small purchases, the expense of levying a fine has often been very severely felt.

Universal consent seems now to have designated the provision formerly made by the law with so much care, as an incumbrance, the anticipation of which is, in every case, to be desired. The most extensive practitioners of the present day will hardly produce an instance where a title of Dower has been purposely suffered to attach upon purchased
[*4] lands. Except in cases of inadvertency or unskilfulness, or *from the short-sighted economy of taking a conveyance in fee, because the purchaser does not happen to be married at the time of the purchase, an instance very rarely indeed occurs in which property becomes liable to the title of Dower in the hands of a purchaser. It is to cases where a person becomes entitled to property by heirship, or under the limitations of wills or settlements, that we are generally to look, at this day, for the occurrence of such a title.

Dower, at the common law, is the sole subject of this treatise. There are, indeed, other kinds of Dower; which are treated of by the law books; as Dower *ad ostium ecclesiæ*, *Ex assensu patris*, and *De la plus belle*, which have long since become obsolete; as well as Dower by the custom of Gavelkind and Borough English, which are confined to certain local districts; and Freebench, which applies exclusively to copyhold lands. The former has been treated of by Mr. Robinson in his "Common Law of Kent;" and the latter by Mr. Watkins in his "Treatise of Copyholds." These subjects are therefore mentioned, if at all, for the purpose of illustration only. The author is too sensible of the increasing incumbrance of a law library to indulge in expositions of what others have already expounded, perhaps better than he could do himself;—and he is too well aware of the immense extent of reading required for the attainment of sound practical knowledge, to trifle with that species of learning which is recurred to, if ever, only for curiosity.

(*d*) See Harger. Co. Litt. 30 *b. note.*

Subject to the slight qualifications to which almost *every legal definition is liable, and which will be gathered under [*5] the different heads of the following treatise, Dower, by the common law, may be defined to be—an estate for life—in the third part—of the lands and tenements—of which the husband was solely seised—either in deed or in law—at any time during the coverture—of a legal estate of inheritance—in possession—to which the issue of the wife might by possibility inherit—and which the law gives—to every married woman—not labouring under any incapacity of taking a legal benefit—who survives her husband—to be enjoyed by such woman in severalty—by metes and bounds—from the death of her husband—whether she have issue by him or not—having for its object the sustenance of herself, and the nurture and education of her children, if any;—and the right to which attaches upon the land immediately upon the marriage, or as soon after as the husband becomes seised—and is incapable of being discharged by the husband without her concurrence.

It will be observed that this estate arises solely by operation of law, and not by force of any contract express or implied between the parties; it is the silent effect of the relation entered into by them; not as in itself incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law.

This view of the subject, which an attentive consideration of all its circumstances will fully establish, is also borne out by the modern practice of courts of equity in denying dower to be a matter of [* 6] substantive *equitable jurisdiction; but at no very distant period, great difficulties were experienced in consequence of a notion which had been adopted by some of our equity judges, and particularly by Sir Joseph Jekyll, that dower was a right arising *ex contractu*. The author has adverted more particularly to the fallacies of this notion in a subsequent part of this work, which treats of the exemption of Equitable Estates from the title of Dower.

For all the purposes of the practical conveyancer, it is of more importance to consider the subject of Dower in its character of an incumbrance, that in that of a remediable right, or of a right reduced into an estate by assignment; since it is very rarely that he is required to advise upon the existence of a title of Dower with a view to its actual prosecution, while his attention is liable to be called, by every day's practice, to the detection of a dormant title in the wife of a vendor, mortgagor, or former owner, in the ordinary process of investigation on behalf of a purchaser or mortgagee. But for the purposes of practical discussion, the right and the remedy are frequently convertible terms, and there are some points connected with the learning respecting the remedies for Dower which, from their influence upon practice, deserve the peculiar consideration of the student in property law; particularly that branch of the subject which relates to the possessory bar to the dowress by the existence of a prior legal term of years, and the circumstances under which that bar will or will not be relieved against in a court of equity.

[*7] *CHAPTER II.

Of MARRIAGE, *with reference to the law of* DOWER.

IN treating of Dower, it has been customary to consider it as founded on the three successive circumstances of Marriage, Seisin, and Death of the Husband. The concurrence of the two former is properly the ground-work of the *title* of dower; the latter is its consummation.

This chronological arrangement having at least the convenience of obviousness, has been here followed.

The subject of Marriage, so far as it is connected with the law of Dower, is open to considerations which call for some degree of attention and discrimination on the part of the student, and may even exercise the acuteness of the experienced lawyer. The obvious business of the present treatise is rather to point out the principles and distinctions which are to be borne in mind in applying the numerous cases on marriage to questions of Dower, than to enter upon any substantive discussion of the cases themselves.

By the ecclesiastical law, as it stood previous to the marriage act, and as it still stands as to cases falling within the exceptions of that act, the existence of matrimony involved a two-fold consideration; comprising, within that general name, the distinct facts of, 1st, the espou-
[*8] sals, or personal contract *between the parties to become husband and wife; and, 2dly, the celebration of that contract *in facie ecclesiæ*. The espousals, or matrimonial contract, which, though requiring no set form or ceremonial, was the substance or bond of the nuptual relation, was of two kinds, viz. *per verbâ de præsenti*, or *per verbâ de futuò*. The former of these, in the contemplation of the ecclesiastical law, amounted to very matrimony,(*e*) the contract being indissoluble by any agreement of the parties; and rendering any subsequent marriage of either of them with any third person absolutely void. But though espousals, or affiance, as it is sometimes termed, was thus the very substance of matrimony, and even by the temporal lawyers, the terms affiance and marriage were often promiscuously used, yet it does not seem to have been allowed that espousals alone, unaccompanied by celebration, should confer the civel rights of Dower(*f*) or legitimacy; but to obtain these temporal advantages it was requisite that the contract of matrimony should be *celebrated* in the face of the church. And though in one case a woman who had made a contract of marriage *per verbâ de presenti*, but whose marriage had not been celebrated till
[*9] after the alienation of the husband, recovered *her Dower upon the ground that the alienation of the land by the husband in the interval between a sentence of the ecclesiastical court for execution of the contract, and the celebration of matrimony pursuant to

(*e*) Swinb. Spousals, p. 9, 13, 15. See also 2 Salk. 437, 438; 6 Mod. 155; and the judgment of Sir Wm. Scott in Dalrymple v. Dalrymple, reported by Dr. Dodson, 1811. 8vo. p. 13.

(*f*) Tract. de Repub. Angl. p. 103; Swinb. Spousals, 2, 15; Perk. sec. 306; and see Moore, 170; and Dodson's Report of the judgment of Sir W. Scott in Dalrymple v. Dalrymple, p. 18. See however Perk. sec. 306; Fitzh. N. B.; Roll. Ab. "Bar. and Feme."(A) pl. 21, as to marriages in chambers, and chapels unconsecrated.

that sentence, was a fraudulent alienation, *quoad* the wife, yet this recovery was reversed *coram rege et concilio*, because neither the contract nor the sentence was a marriage by the temporal law, and so the husband had no seisin during his marriage with the demandant.(*g*) The statute of 26 Geo. II. therefore, commonly called the Marriage Act, has made no material alteration in the law so far as relates to Dower, by taking away the force of contracts *per verbâ de præsenti* and *futuro*, however widely that provision may have broken in upon the doctrine of the ecclesiastical courts in other respects. The only alterations that can be stated as having been produced by that clause, as to the title of Dower, are, 1st, that, before the statute, a woman with whom a contract of matrimony had been made, *per verbâ de præsenti* or *futuro*, had the power of compelling the execution of that contract in the ecclesiastical court, and, as a consequence, of entitling herself to Dower; while, as to all cases within the statute, the power of the ecclesiastical court to decree a celebration *in facie ecclesiæ* pursuant to the contract is taken away; and, 2dly, that no marriage is now void, as formerly, by reason of any such precontract; that objection to the validity of a marriage being impliedly taken *away by the clause of the marriage act in question.(*h*) The cases, therefore, put in the old books, of [*10] a woman being barred of her dower by reason of precontract, are now become obsolete.(*i*)

The only other view in which the marriage act is relevant to the subject of this treatise is, as having introduced certain additional circumstances, such as banns, license, consent, &c. as requisites to the validity of marriages as to all cases within the act, and as having declared marriage not accompanied with the prescribed formalities to be actually *void*, and consequently precluded such marriages from being the foundation of any claim, to the validity of which an actual legal marriage, and not merely a marriage in reputation, is requisite. And in the construction of this statute the courts have decidedly refused to put that interpretation upon it which has been occasionally adopted when the law makes a thing void for the benefit of the parties, as in the statute of apprenticeship, namely, that they may waive that advantage, if they please; but the marriage act being avowedly made against both the contracting parties, an irregular celebration is void to all intents and purposes, and no subsequent agreement or cohabitation of the parties can give effect to it.(*k*)

It must be borne in mind that the provisions of the marriage act do not extend to marriages *between Quakers or Jews, nor to marriages solemnized beyond the seas, or in Scotland.(*l*) [*11]

It is the peculiarity under which claims of Dower lie at this day, that the existence of a matrimonial relation as one of the circumstances, the proof of which may be involved in the claim, is not, as in other cases where it is incidentally brought in issue in the temporal courts, capable of being inquired into and ascertained in those courts. The rules of evidence, therefore, which have been adopted in the temporal courts in reference to questions of marriage, are no further applicable, when the

(*g*) Co. Litt. 33 *a*. n. (10). Hal. MSS.
(*h*) See Hargr. Co. Litt. 82 *b. note* (4).
(*i*) See 1 Bl. Com. 435.
(*k*) Chinham v. Preston, 1 Bl. 192; Bull. N. P. 114.
(*l*) Sect. 18.

question arises upon a claim of Dower, than as those rules are recognized by the ecclesiastical court, to which, in this case, the question is referred.

This peculiarity arises from the antiquity of the action in which Dower is tried, it having been instituted at a time in which the temporal courts had not assumed, to the extent to which they now do with great convenience to the suitor, the power of incidentally inquiring into and determining matters upon which they have no original or substantive jurisdiction. By the ancient rules of pleading, it was prohibited to bring in issue to the country a question, which, like that of the *legality* of a marriage, it was the sole and exclusive privilege of the ecclesiastical courts to decide;(*m*) and any plea *or replication tending to that effect, was treated as an attempt to oust the bishop of his jurisdiction; and though the temporal courts are now considered as having the inherent power of deciding incidentally, either upon the fact or legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction,(*n*) yet in the cases of writs of Dower and other real actions, where the issue is upon the legality of the marriage,(*o*) they have declined departing, except in cases of necessity, from the old technical rule, which propounds the mode of trying the question to be by the certificate of the ordinary. The only exceptions to this arise from the necessity of the case; as of a marriage in a foreign country, or in Scotland, where there is no episcopal jurisdiction.(*p*)

[*12]

These exceptions are founded not on the inability of the spiritual court to consider and decide on the validity of such a marriage, but on the ground that the reference to the bishop, in the old form of real actions, is not supposed to be for the assistance of his opinion, but for an official certificate of the fact that the parties are lawfully married, from the person having the proper local jurisdiction for inquiring into and ascertaining it. If *this is not the reason for the distinction, it is difficult to apprehend why one case should not be referred to the ecclesiastical court as well as the other.

[*13]

What is the precise evidence admissible in the bishop's court, for the purpose of authorising an affirmative certificate, the writer has not been so fortunate as to satisfy himself. In one book it is observed, that on the inquisition in the bishop's court the party's own sole confession, however taken upon oath either within or without the court, shall not have credit, but the truth, as far as possible, must be sifted out by depositions of witnesses, and other lawful proofs and evidences. In cases within the marriage act, it is apprehended that compliance with all the solemnities of that act must be proved.(*q*) But where that act does not

(*m*) The *right* of Espousals is always triable by the bishop. 49 E. 2, 18; 39 E. 3. 26; 39 Ass pl. 8, as if the issue be whether a feme be accoupled in lawful matrimony. 49 E. 3. 18, and not *per pais*. 7 H. 4. 25 *b.*; 11 H. 4. 14 *b.*; 19 H. 6. 18; 39 E. 3. 26, 33; 50 E. 3. 15; 49 Ass. 7. See also Hard. 63; 1 Vent. 77; 1 Lev. 41; 1 Leon. 53.

(*n*) See Skin. 455.

(*o*) On the issue of "general bastardy" in a real action, where the imputed bastard is a party to the writ, the trial is the same as on the issue of *ne unques accouple* in a writ of Dower. See 12 Co. 67.

(*p*) So during the abolition of Episcopacy, in the time of the Commonwealth, the trial of *unques accouple in loyal matrimony* was *per pais*. See Hard. 65.

(*q*) See Lord Mansfield's observation, 1 Bl. 367.

apply, as on marriages of Jews or Quakers, the writer has not been able to ascertain whether circumstantial evidence may be admitted.(*r*)

Notwithstanding the question of marriage, when arising on a claim of dower by a woman married in England, is triable by the ecclesiastical court, where the *right* and not merely *the fact* of the marriage, is cognizable, yet the question is attended with a circumstance which has the effect of reducing it very nearly to a question of fact; namely, that it does not arise till after the *death* of one of the parties. In many cases where, if both the parties *were alive, the spiritual court must certify against the marriage, as null by the ecclesiasti- [*14] cal law, the certificate must, after the death of either of them, be in favour of the marriage, on the ground, that though voidable, it was never annulled by sentence of the spiritual court during the lifetime of the parties, and that court, which acts only *pro salute animarum*, has, by the death of the husband, lost its Jurisdiction, and cannot now avoid the marriage. The proposition, therefore, stated in many of the books, that, for the purposes of Dower, the marriage must be *de jure*, and not *de facto*, though true to some extent, is more calculated to mislead the student than to convey any correct impression to his mind. It would appear to be in cases only where the marriage was absolutely *void*, or where, being *voidable*, it was annulled by sentence in the spiritual court in the lifetime of the parties, that the *illegality* of a marriage is an impediment to a claim of Dower. It is accordingly said by Lord Coke in his Commentary on the chapter on Dower, "Here Littleton speaketh of a wife generally, and generally is to be understood as well of a wife *de facto* as *de jure*."(*s*) It is also said to have been adjudged that the wife of a priest (before the Stat. 5 and 6 Ed. VI. c. 12,) should have Dower,(*t*) this marriage being not void but voidable, and in the modern case of Haydon v. Gould(*u*) it seems to have been *the impression of the Court of Delegates that a marriage by *a layman* would [*15] entitle the wife to a temporal right, although it would not authorise the ecclesiastical court to grant administration of the wife's effects to the husband.

In Jacob's Law Dictionary(*v*) it is remarked that "marriages by Romish priests, whose orders are acknowledged by the Church of England, are deemed to have the effects of a legal marriage in *some* instances; but marriages ought to be solemnized according to the rights of the Church of England to entitle the parties to the privileges attending legal marriages, as Dower, Thirds," &c. This is true, perhaps, only in the sense, that such marriages, generally speaking, would be *void* by the marriage act.

Independent of the statute law there are cases in which a contract of marriage is, in its own nature, a mere nullity, and therefore does not require a sentence of the ecclesiastical court to avoid it.

(*r*) It seems such evidence cannot be received when both the parties are living, as in a suit for jactitation. 2 Bl. 879; but see Wood. Civ. L. 122.

(*s*) Co. Litt. 33 *b*.

(*t*) Dyer, 185 *a*. marg.; and see Co. Litt 136 *a*.

(*u*) 1 Salk. 119. This case was before the marriage act. Upon the circumstances, the marriage would probably now be held void by this act, as not being solemnized in a church or chapel within the meaning of the act.

(*v*) Tit. 'Marriage;' and see 2 Burn's Eccl. Law, 473; Rex v. Fielding, 5 St. Tr. 610; Rex v. Inhabit. of Brampton, 10 East, 283, 288.

The case of bigamy, in particular, is an example of this: "If a man seised of land, tenement, or rent, &c. in fee, take a wife, and during the same marriage he marrieth another wife, and the husband die, leaving both wives, the latter wife shall not have dower; because the marriage between them was *void.* And if a woman take a husband, and living the same husband, she marrieth another husband, who is seised of land in fee, and the second *husband die, she shall not have Dower of his land, *causa patet.*"(*w*) The principle of this case is the positive legal disability of a person already married, to contract marriage with any other during the continuance of the prior relation.

[*16]

It appears also that the absence of consent on the part of either the husband or wife, renders a marriage merely void by the common law as well as by the spiritual law: as where a man marries a woman by force and duress.(*x*)

It was formerly held, that the wife of an *idiot* should be endowed,(*y* but Sir W. Blackstone(*z*) is of opinion, that the law would be otherwise now, on the ground of the decision in Morrison's *case,*(*a*) that an idiot, being incapable of consent, cannot contract marriage.

Marriages of persons found lunatics by inquisition are declared void to all intents and purposes, by the statute law.(*b*) It was however doubted, in *ex parte Turing,*(*c*) whether it was not necessary to have a *sentence of the Ecclesiastical Court, declaring the marriage void; and Lord Eldon mentioned, that under the Royal Marriage act,(*d*) declaring certain marriages void, a sentence has been thought necessary, though he did not know upon what ground that opinion proceeded. The case was referred to the Master, but it does not appear what was the result of the inquiry.

[*17]

It is difficult to understand how the express words of the statute can be neutralised.(*e*)

It is to be mentioned, as an exception to the nullity of marriages arising from *positive disability* to contract matrimony, that *for the purposes of Dower,* and with the modern qualifications arising from the Marriage act, as to cases within that act, a marriage may be good although contracted before the age of consent, and although the husband dies without having arrived at that age. This anomalous doctrine owes its existence to the privileged character of Dower. "Therefore, if the

(*w*) Perk, sec. 304, 305 (cites T. 39, E. 3. 15). See also 1 Salk. 120; Cro. Eliz. 858; Roll. Abr. 'Bar. and Feme' (A) pl. 2. But, it seems, the tenant in the writ of Dower cannot *plead* bigamy, but must give it in evidence before the bishop, on the general issue of *ne unques accouple,* &c. Bro. Dow. pl. 54, (cites 39 E. 3. 15).

(*x*) Roll. Abr. 'Bar. and Feme' (A) pl. 5. (cites 11 H. 4. 14, Dubitatur. 19 H. 7.) And see 2 Inst. 687; Kelw. 32, 52.

(*y*) Co. Litt. 30. *b.* 80. *a.* note. 3 Bac. Abr. 533; and see Roll. Abr. 'Bastard.' (A) pl. 7; 'Baron and Feme' (A) pl. 8; Sid. 112.

(*z*) 2 Com. 130.

(*a*) Suppl. to 1 Com. 8.

(*b*) 15 Geo. 2. c. 30; Co. Litt. 80. *a.* note.

(*c*) 1 Ves. and Bea. 140.

(*d*) 12 Geo. 3. c. 11.

(*e*) In Buller's Nisi Prius, p. 114, a MS. case of Rex v. Preston next Travasham M. 33 Geo. 2. B. R. is mentioned, in which it was expressly held, that where the evidence is clear that a marriage was not celebrated according to the requisitions of the *marriage act,* it is totally void, and no declaratory sentence in the ecclesiastical court is necessary. This is undoubted law.

wife be past the age of nine years (says Lord Coke,) at the time of the death of her husband, she shall be endowed, of what age soever her husband be, albeit he were but four years old.(*f*) *Quia junior non potest dotem promoreri, *neque virum sustinere; nec obstabit mulieri petenti minor ætas viri.* Wherein it is to be [*18] observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before twelve, nor a man before fourteen, yet this inchoate and imperfect marriage (from the which either of the parties of the age of consent may disagree,) after the death of the husband shall give dower to the wife, and therefore it is accounted in law after the death of the husband *legitimum matrimonium*, a lawful marriage, *quoad dotem.*"(*g*)

*Lord Coke also adds, "If a man taketh a wife of the age [*19] of seven years, and after alien his land, and after the alienation the wife attaineth to the age of nine years, and after the husband dieth, the wife shall be endowed, for albeit she was not absolutely dowable at the time of the marriage, yet she was conditionally dowable; viz. if she attained to the age of nine years before the death of the husband, &c. for by his death the possibility of Dower is consummate."(*h*)

The effect of a sentence in the ecclesiastical court, *annulling* a marriage by reason of canonical impediment, as consanguinity, affinity, frigidity, &c. is to make that marriage void *ab initio*,(*i*) and consequently to put an end to the title of Dower."(*k*)

(*f*) But, see Bro. Dow. pl. 88, where it is said, that if the feme is of the age of nine years, and the baron is not of seven years, she shall not have Dower. Contra, if he is of seven at the time of his death. See, however, Dr. and Stud. Dial. 1. ch. vii.

(*g*) Co. Litt. 33. *a.* and see 2 Inst. 234; Litt. sec. 36; Bro, Dow. pl. 36, 45; Fitzh. N. B. 149. (L); 1 Leon. 54; Dy. 369; Dr. and Stud. Dial. 1. chap. vii. 2 P. W. 704.

A difficulty seems formerly to have been entertained how the bishop would certify this to the court as a legal marriage, which by the rules of the ecclesiastical law was but *sponsalia de futuro.*

In a case in Dyer (13 and 14 Eliz.) f. 305. *b.* the bishop certified to the writ, that the husband of the demandant at about the age of twelve years, and the demandant at the age of sixteen years, contracted matrimony *per verba de præsenti*, and procured it to be lawfully solemnized in the face of the church at B. &c. The court not holding this a sufficient certificate, inasmuch as it did not certify the *legality* of the marriage, directed a writ *de melius certiorando*, whereon the bishop answered, that the age of the husband was eleven years, ten months, and twenty days, at the time of the espousals solemnised, assuming to lay the insufficiency of the certificate on the uncertainty of the words "*about* the age of twelve years." The court appears to have treated this as a mere evasion, for they fined the bishop twenty pounds. In a subsequent term, the bishop made a fresh certificate, that Thomas Gray, of the age of eleven years, ten months, and twenty days, and Elizabeth, of the age of sixteen years, being respectively free and exempt from all matrimonial contract or espousals, contracted matrimony *per verba de præsent*, and in the face of the church at B. &c. on such a day, lawfully solemnized it between them; *and so were coupled in holy matrimony.* After many arguments upon the sufficiency of this return, and a reference to the doctors, who were of opinion, that it was repugnant in itself, and insufficient, this certificate was also rejected. Dy. 313. b. The successor of the bishop afterwards made a fresh return upon a new writ, stating, that he had found upon inquiry, that Elizabeth and Thomas Gray were *joined in lawful matrimony;* the doctors being of opinion on a case propounded to them, that the ordinary ought so to certify it, as the case was put touching Dower, although otherwise, they were *sponsalia de futuro* [by reason of the nonage,] yet, in a cause of Dower, they should be extended to be true matrimony, *ratione privilegii.* Dy. 369. *a.* This appears to have been one of the struggles formerly so frequent between the temporal and ecclesiastical courts. The author's reason for stating it here is on account of the principle which it furnishes.

(*h*) Co. Litt. 33. *a.* But see 13 Co. 20, *contra arguendo.*

(*i*) See Aughtie v. Aughtie, 1 Phillimore's Reports, 203.

(*k*) 7 Co. 140. Roll. Abr. Dow. (R) pl. 1—5. 1 Co. Litt. 32. *a.* 33. *b.* And see Jenk.

[*20] *But these sentences of *Divorce*, as they are frequently, though somewhat incorrectly termed,(*l*) must be carefully distinguished from Divorces properly so called, namely, Divorces *à mensa et thoro*, in which the marriage still continues in full force, and the title of Dower is consequently unaffected.(*m*)

It should also be noticed, that a divorce *à mensa et thoro*, will be no bar to dower, although there was cause to annul the marriage, as for consanguinity.(*n*)

[*21] *And, as has been already intimated, in all cases of *voidable* marriages, if the husband dies before the sentence of the ecclesiastical court annulling the marriage is pronounced, the wife *de facto* will be entitled to Dower, for the marriage being only voidable, and not actually avoided by sentence in the lifetime of both the parties, it cannot, for the reason already mentioned, be avoided afterwards;(*o*) and consequently, the Bishop must certify that the parties were lawfully married,(*p*) if the tenant in a writ of Dower plead *ne unques accouplè*.

In the cases of marriages in foreign countries, it appears to be adopted by the courts as a general principle, that, if solemnized according to the laws of the country where contracted, they shall be acknowledged here as legal marriages;(*q*) and it was admitted by Lord Hardwicke in Roach v. Garvan,(*r*) that the sentence of a foreign court, *having proper jurisdiction*, is conclusive evidence of marriage, from the law of nations in such cases; as otherwise the rights of mankind would be very

[*22] precarious and uncertain. The same doctrine has *been laid down by Lord Mansfield, in Robinson v. Bland.(*s*)

But reasonable evidence of the celebration of the marriage, although without sentence, would, it is apprehended, be sufficient, even in the

44, where it is said, that "where the cognizance of a cause belongs to the Spiritual Court and they give sentence in it, and express the cause of their sentence, although this cause of sentence be null and void in our law, yet, our law approves of the sentence." See also 7 Co. 140.

(*l*) The common distinction is between sentences of Divorce *a vinculo matrimonii*, and sentences of divorce *a mensa et thoro*.

(*m*) Co. Litt. 32. *a*. 33. *b*. 235. *a*. 18 E. 4. 29; 10 E. 3. 15. Dame Powell v. Weeks, Noy, 108. Lady Stowel's case, Godb. 145; 2 Inst. 435; 2 Leon. 171, (cites 11 H. 7. 27;) 7 Co. 140. In Roll. Abr. 680, pl. 13, it is said, that "if the wife be divorced for adultery, (which does not dissolve the bond of marriage by the canon law, nor of our church in this realm, but is only *a mensa et thoro*,) yet, this shall bar her of her Dower." But, no case is cited for this, and the authorities are uniformly contrary. But see *infra*, chap. ix. that *adultery* and *elopement*, in conjunction, are a *forfeiture* of Dower; and it is observable that the passage in Rolle is under the head "Elopement."

It is stated in some of the treatises upon the authority of Shute v. Shute, Prec. in Chan. 111, that a court of equity will not assist a widow in recovering her Dower, who has been divorced for adultery. But a careful perusal of that case will show that it was merely determined upon the old rule, that where there is no impediment at law, a court of equity will not entertain a bill for Dower. See chap. xiii. infra. See also Seagrave v. Seagrave, 13 Ves. 439, that adultery is not a bar to equitable relief.

(*n*) Rennington v. Whithipole, Hob. 181, cited Vaugh. 249, 322.

(*o*) 7 Co. 142. Harris v Hicks, 2 Salk. 548. Pride v. Earl of Bath, 1 Salk. 120; 4 Mod. 182; Carth. 271; and see 1 Ves. S. 245. Rennington v. Cole, Noy, 29.

(*p*) Co. Litt. 33. *a*. (cites 10 E. 3. 35; Fleta, l. 5, c. 22; Brit. c. 107;) Perk. sec. 305.

(*q*) See 2 Burr. 1079; 2 Eq. Ab. 411; 10 East, 286, (where see as to marriages in Ambassadors' chapels;) Judgment in Dalrymple v. Dalrymple, p. 6.

(*r*) 1 Ves. S. 159.

(*s*) 1 Bl. 259.

case of Dower, where no circumstances appear to induce doubts whether the laws of the country were complied with.(*t*)

Doubts have been formerly entertained of the validity of marriages celebrated in Scotland, according to the laws of that country, between persons who went there from England to evade the provisions of the marriage act, in consequence of Scotland having been expressly excepted out of that act. These doubts arose on the cases of marriages of minors without the consent of parents or guardians, and without banns, which were declared void, as clandestine marriages, by the 26 Geo. II. c. 33.

In Ilderton v. Ilderton,(*u*) it is reported to have been admitted by the bar, and assented to by the bench, that a marriage celebrated in Scotland was such a marriage as would entitle a woman to Dower in England. The reporter adds, "but this case is quite clear of the question whether marriages celebrated in Scotland between persons who *go thither* *to *evade the laws of England*, be [*23] valid in England; and in Robinson v. Bland,(*v*) Lord Mansfield expressed a doubt, whether the *lex loci* ought to be applied to cases accompanied with circumstances so strongly marking the intent to *evade* the law of England. In a subsequent case, however, where the parties, both English subjects, eloped to Scotland, and were married, the wife being under age, and without the consent of her guardian, it was determined in the Court of Arches, and afterwards affirmed on appeal to the Court of Delegates, that such marriage was valid.(*w*)

*CHAPTER III. [*24]

Of the application of the Rule requiring a SEISIN IN THE HUSBAND *during the Coverture, in order to the attachment of a* TITLE OF DOWER.

THE second circumstance essential to a title of Dower, is *a Seisin* of lands or tenements, at some time during the coverture,(*a*) in the person who fulfils, or has fulfilled the character of husband to the woman laying claim to that title. The rule requiring a seisin, taken loosely, is almost too obvious to require propounding; since, in the nature of things a title to dower can necessarily arise no otherwise than in respect of such lands or tenements of which the husband *was seised;* and the additional term of the rule, that the seisin shall be *during the coverture*, carries an evident propriety and convenience on the face of it, as it would be absurd that a title commencing with the marriage contract, should

(*t*) In questions of bastardy it is clearly so. See Alsop v. Bowtrell, Cro. Jac. 542; where a certificate under the seal of the minister of the town, and evidence of cohabitation as man and wife for two years, was received as sufficient proof of a marriage at Utrecht.

(*u*) 2 H. Bl. 145.

(*v*) 2 Burr. 1080. 1 Bl. 259.

(*w*) Compton v. Bearcroft, 1 Dec. 1768; Bull. N. P. 113. Hargr. Co. Litt. 79. *b.* n.; 2 Burr. 1080. n. and see also *Ex parte Hall*, 1 Ves. and Bea. 112; and Sir W. Scott's Judgment in Dalrymple v. Dalrymple, p. 52.

(*a*) Litt. sec. 30; Perk. sec. 301; Fitzh. N. B. 147 (E); Co. Litt. 31. *a.*

relate back to all property of which the husband had at any period of his life-time been seised, and his seisin of which was previously determined. But the rule is principally propounded here as affording the material inference that a right or title to real property, however complete in other respects, will never furnish a foundation for a claim of *dower, if unaccompanied with that which is technically termed a seisin.(*b*) It is therefore remarked by Perkins,(*c*) that the husband "may prejudice his wife in her title of dower by his laches of entry, his laches of suit, or his laches of pleading," as in the cases which he puts immediately after:—"If a man seised of one acre in fee be disseised of the same acre, and taketh a wife, and dieth before his entry;"(*d*) or, "if a man dieth seised in fee, and a stranger doth abate in the same land, and after the abatement, the heir marrieth a wife, and dieth before his entry."(*e*)

[*25]

Upon the same principle, if a man grants an estate upon condition on the part of the grantee, and afterwards marries, although the condition is broken in his life-time, yet, as a condition annexed to an estate of free-hold, will not revest the estate in the grantor without entry or claim, if he neglects to take advantage of the breach, his wife will not be dowable, for he had no more than a right or title of entry for condition broken.*(f)*

The cases put all suppose the seisin to have formerly been in the husband, and therefore it is *material to their accuracy, that the marriage should be noticed as taking place subsequent to the determination of that seisin, for, as will be gathered from another part of the treatise, a title of Dower will exist in the cases put, although, during the converture, the Seisin of the husband is converted into a right. But, supposing the right to *descend* to the husband, it is of course immaterial at what time the marriage takes place. Till the right is prosecuted to a seisin, no title of Dower can arise.

[*26]

It is also to be observed, that the prosecution of a right or title, even to judgment, is not sufficient if the husband dies before entry, or execution served; for the judgment alone cannot confer a seisin.(*g*) And it is material that this point applies not only to recoveries on adverse suits, but also to common or feigned recoveries. Until the return of the writ of execution, or at least till seisin is delivered, no seisin is in the recoveror, and consequently no use can arise.(*h*)

And although, if execution is afterwards sued by the heir, the execution, when served, shall have relation to the act of the ancestor, and the heir be in by descent,(*i*) yet, according to the old books, this fictitious

(*b*) Mr. Watkins (Essay on Descents, p. 51,) has pointed out an error in Wood's Institutes, b. 2. ch. 1. sec. 5, where it is said, that the widow shall be endowed when the husband has only *a right:* but, it is clear from the context of the passage, that nothing more was intended than to distinguish between a seisin in deed, and a seisin in law.

(*c*) Sect. 366.

(*d*) Ib. (cites E. 1 H. 7. 17;) and see 2 Co. 59; Co. Litt. 222. *a.*

(*e*) Perk. sec. 367, (cites E. 21, E. 4. 60,) and see sec. 374

(*f*) Perk. sec. 368; 6 Co. 34. *b*; but, see the distinctions as to the necessity of entry or claim, Co. Litt. 218. *a.*

(*g*) Plow. 43; Perk. sec. 370, 375.

(*h*) Jenk. 249. ca. 40. pl. 4; Witham v. Lewis, 1 Wils. 55; Shelly's case, Sir W. Jones. 10 Moor. 141; and see 4 Bro. P. C. 510, 1 Prest. Conv. 149.

(*i*) Shelly's case, ut supra; Jenk. 249; Co. Litt. 361. *b.*

seisin, or seisin by relation, being admitted for purposes of tenure only, will not extend to confer on the ancestor the incidents of an actual *seisin, or entitle his wife to Dower. The following case put by Perkins exemplifies this position: [*27]

"If there be husband and wife, and the husband is seised of one acre of land by wrong title, and is impleaded of the same acre by him that hath right, who [viz. the husband], voucheth a stranger to warranty, who entereth into the warranty and loseth, and each of them hath judgment for to recover against the other,(*k*) and the demandant entereth, and the husband dieth before execution sued against the vouchee, his wife shall not have Dower of this land, notwithstanding the heir of the husband sue for the execution, and this land cometh in lieu of the land which the husband was seised of during the marriage betwixt him and his wife."(*l*)

This point may be material where lands are purchased from a tenant in tail, and the purchaser dies before the recovery is completed by delivery of seisin, or where a tenant in special tail has a wife not dowable of that entail, and suffers a recovery to his own use.

A case stated by Brooke(*m*) to the following effect, seems referrible to the same principle. Lands were given to the father of the husband in tail; he died, and the husband enfeoffed a stranger, who regave to the husband and his first wife in tail special. They had issue the tenant, against whom a *second wife* brought a writ of Dower, on the ground that the *tenant was remitted to the estate tail general. This [*28] claim must have assumed, that the tenant, being remitted to the tail general, and taking that estate by descent, it must be intended that the husband, by relation of law, was seised of that estate, and not of the tail special, which was defeated by the remitter.(*n*) But, the book adds, that inasmuch as the husband during the coverture had nothing but by the second tail, whereof the demandant was not dowable, the opinion of the court was against her.

Following apparently the same principle, that a seisin by relation is a seisin for the purposes of title only, it has been laid down by Chief Baron Gilbert, that "if lands are bargained and sold, and the bargainee dies before enrolment, his wife shall not be endowed; for, the right of Dower is, according to the rules of common law, consummate by the death of the husband; and, at the death of the husband, the bargain and sale had no effect to vest the lands in him; and though the freehold, after enrolment, has a retrospect to the date of the deed, yet *there cannot thereby arise to the wife a new title of Dower*, contrary to the rule of common law, without an express provision by the statute."(*o*) On the other hand, the point is stated by the same author in a subsequent page, to the reverse of this *conclusion. He remarks, that "if the estate shall be said to pass as to strangers, *ab initio* [by [*29]

(*k*) The sense must be that the demandant hath judgment to recover against the tenant, and the tenant to recover over in value against the vouchee.

(*l*) Perk. sec. 375.

(*m*) Bro. Dow. pl. 18, (cites 46 E. 3, 24,) and see ibid. pl. 9.

(*n*) But see pl. 9, where the plea of the wife seems to have been that the issue by the remitter was *estopped* to say that her baron was not seised of the estate which the issue had.

(*o*) Gilb. Uses, 96; see also Shep. T. 226, where the point is said to have been so held in Sir Robert Barker's case, in 6 Jac. See Dimmock's case, Owen. 149, where the same point was agreed by all the justices in the Court of Wards.

relation], for their disadvantage, it shall pass for their advantage. And therefore, if a bargain and sale be made to a man, and he dies, and then the deed is enrolled, it seems, his wife ought to be endowed."*(p)* So it is also said in Cro. Car. 217, to have been resolved for the wife of Baron Frevill. The latter opinion is contended for by the learned editor of Gilbert on Uses: who observes, that "if it be once admitted, that after enrolment, the fee is in the bargainee by relation, all the consequences of a seisin in fee from the date of the deed must follow"—"Therefore, his wife must be dowable, &c."*(q)* It deserves consideration, however, whether the cases already stated, and others of the same description to be met with in the old books, do not fully establish the position, that there may be a seisin by relation for some purposes, and not for all, and sanction the denial of Dower to the wife of a bargainee, who dies before enrolment. It must, notwithstanding, be admitted, that the distinction does not appear to have been recognised, as to Freebench, in a case where, if tenable, it would certainly have decided the question. In the modern case of Vaughan v. Atkins,*(r)* the court of King's Bench were of opinion, after long argument, that the admittance of the heir of a surrenderee of customary frechold would have such relation to the surrender as to make the widow of the surrenderee entitled to free-
[*30] bench; and, although *the attention of the court was called in that very case to the decision respecting bargains and sales which has just been adverted to. It was remarked by Lord Mansfield, that "the vendor, his widow, and his heir, and all claiming under him, are concluded from saying, after admittance, that the land did not pass *from the day* of the surrender. Upon that ground, the lessor of the plaintiff claimed the inheritance whereof his brother (the surrenderee), died seised; and, it should not be in his mouth to say, against the widow, that his brother did not die seised."*(s)* His Lordship, therefore, seems to have denied that there may be a seisin by relation for some purposes, and not for other purposes; a position which it would be difficult to reconcile with many cases in the old books. The argument of the Chief Justice would just as well prove that the wife of a recoveror, who dies before execution served, may, after the recovery is executed to the heir, claim her Dower. Until the law on this head shall be fully reconsidered, it would seem hardly prudent for the practitioner to treat a title so circumstanced otherwise than as subject to the attachment of Dower, whether in the wife of a bargainee, recoveror, or other person, whose heir shall acquire a title by descent from him, by relation of law.

In a subsequent part of this chapter, it will be noticed, that there are cases in which a *joint* seisin (of which a woman is not dowable), may, after the death of the husband, become a sole seisin, *by relation*, and
[*31] *that in those cases it has been held that the wife is dowable.

In the application of the rule requiring a seisin in the husband, it is material that the law does not require an *actual* seisin, or seisin *in deed*, but that it is sufficient to satisfy the rule that the husband have a seisin *in law.(t)*

(*p*) Gilb. Uses, 292.
(*q*) Ib. by Sugden, 213, n.
(*r*) 5 Burr. 2765.
(*s*) Ib. p. 2787.
(*t*) Co. Litt. 31. *a.*; Litt. sec. 448; Perk. sec. 304, 370; Sir W. Jones, 361.

In this respect, Dower differs from Curtesy, for, with the exception of a few particular cases, a man shall only be tenant by the curtesy of such tenements as he or his wife had an actual seisin of during the coverture. The reason of the distinction is assigned by the old books: the husband has himself the power of procuring an actual seisin of his wife's lands; but the wife cannot compel the husband to enter upon his own lands.(*u*)

From the rule that a seisin in law is sufficient for a title of Dower to attach upon, it follows, that if lands descend upon a man who is married, or who marries at any time during the continuance of seisin, the wife shall be endowed, although he dies before entry;(*v*) and that although a stranger enters and abates on the death of the ancestor; for the law contemplates that there was a space of time *between the death [*32] of the ancestor and the entry of the abator, during which the heir had a seisin in law.(*w*) The case put by Perkins of a tenant dying without heirs, and a stranger abating upon the lord, who dies before entry,(*x*) is to the same effect. The seisin is cast upon the lord by the act of law, namely the escheat, and this implied seisin, although afterwards avoided by the entry of the stranger, is a sufficient foundation for the title of Dower.

Upon the same principle, if a man is seised of a remainder or reversion, expectant upon an estate of freehold, and the estate of freehold determines by the expiration of the time comprised in its limitation, before or during the coverture, the wife will be dowable although he dies before entry, or although, after the marriage, a stranger *intrudes* upon his seisin.(*y*) But if, upon the determination of the particular estate, the tenant of that estate holds over, the husband must enter to acquire a seisin; and, if he dies without entry, his wife shall not be endowed.(*z*)

This difference between the cases of intrusion by a stranger, and deforcement by the particular tenant, will be explained by considering that in the former case the law casts the seisin of the freehold upon the remainder-man in the very instant of the determination of the particular estate, and consequently that the entry of the stranger must be subsequent *to the commencement of that seisin, since he cannot [*33] enter *as an intruder* till *after* the determination of the particular estate; while if the particular tenant holds over after his estate is determined, the implied seisin which would otherwise have devolved on the remainder-man is intercepted, for the particular tenant has a continuing seisin of the freehold, though under a wrongful title, without the intervention of any event which can afford room for the supposition of an intermediate seisin. Hence, the reason assigned by the books that

(*u*) Bro. Dow. 75; Co. Litt. 31. *a*. Another reason, depending upon the doctrine of tenures, is given in 8 Co. 71.

(*v*) Fitzh. N. B. 149, (cites 7 E. 3. 66; 21 E. 3. 31; 3 H. 7, 103;) Perk. sec. 372; Litt. sec. 448, 681; Co. Litt. 31 *a*.; Gilb. Dow. 391; Bro. Dow. 75, (cites 21 E. 4. 60.) So if the king's tenant died seised, and the heir died before he entered, his wife should be endowed. Fitzh. N. B. 149.

(*w*) See the subsequent part of this chapter, on the duration of seisin requisite to the attachment of a title of Dower.

(*x*) Perk. sec. 371.

(*y*) Perk. sec. 372.

(*z*) Bro. Dower, pl. 29, (cites 2 H. 4. 22.)

the wife is not dowable, is that the frank tenement does not determine without entry.(*a*)

It should seem, however, that in this case the wife has a *primâ facie* title to dower upon showing that the previous estate determined in the lifetime of the husband; for the possession being supposed vacant by the determination of the particular estate, the law casts it upon the person next in succession, and will not presume a wrong, as a deforcement would be. In modern practice, too, it generally happens that the lands are in the occupation of tenants under leases for years, and in that case, although the person whose estate is determined should continue to receive the rents and act as owner of the estate, yet the possession of the termors for years would preserve the seisin of all persons becoming entitled to the reversion, and no deforcement could occur while those termors continued in possession.(*b*)

[*34] *Under the doctrine of uses the freehold may be made to shift from one person to another without the formality of a common law entry. In these cases, therefore, it would seem that if the tenant of the estate which is defeated by force of a conditional limitation or proviso of cesser, holds over, after the event, if he has the freehold at all, it must be under a new seisin, the result of a constructive disseisin of the person entitled to the benefit of the limitation or proviso. In this case, then, there would seem to be an intermediate seisin in law in the person in whose favour the shifting use operates, and if so, his wife would be dowable notwithstanding the deforcement; but this is a point on which the writer does not recollect to have met with any authority.

As on conveyances under the statute of uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, his wife will be dowable although no entry is made, or other act done by the husband to acquire a seisin *de facto*.(*c*) But wherever an actual entry is necessary to give effect to a conveyance, there the husband must enter to confer a title of Dower on the wife; for till entry he has neither seisin in law or in fact. The case of an exchange at the common law is an example of this, where, if the husband die without executing the exchange by entry on the land taken in exchange, the wife will not be dowable thereof.(*d*) So in the case of a partition between *joint tenants*, the wife would not be dowable at all until the partition was executed by

[*35] *entry, since she is not dowable of a joint seisin; while if the partition were made between tenants in common, or coparceners, and the husband died before entry, she would be dowable only of an *undivided* share.

But in modern practice, exchanges and partitions are usually made by conveyances to uses, and as the estates are consequently executed immediately on the delivery of the deed, the title of Dower will attach without any entry by the husband. And even in the case of a bargain and sale under a common law authority to executors to sell, as the vendee, when ascertained by the instrument, is considered as a devisee, and the seisin is consequently transferred to him from the heir without entry, the same position would seem to hold.

(*a*) Bro. Dow. pl. 29.
(*b*) Carhampton v. Carhampton, 1 Ir. Term Rep. 567.
(*c*) Gilb. Uses, 96; 2 And. 161. (*d*) Perk. sec. 369.

As to incorporeal hereditaments, it follows, by analogy, that the circumstances equivalent to an actual seisin of those hereditaments which lie in livery, are not necessary in order to confer a title of Dower.

Therefore if the husband purchases a rent, and dies before the day of payment, yet the wife shall be endowed.(*e*) Perkins puts the case that "if a rent *is granted unto a man in fee, and [*36] the grantee *accepts* of the grant, and takes a wife, and at the day of payment the tenant of the land tenders the rent unto the husband, and he will not receive the same, but utterly refuses the same, and dies before any receipt of the rent by him, or by any other in his name, or for him, &c., and before any thing paid to him in the name of seisin of the rent, &c. yet the wife shall have Dower of the rent. But if in the same case the husband had brought a writ of annuity against the grantor of the rent, and had recovered in that action, then the wife shall not have Dower thereof."(*f*) The ground of the latter distinction is that by bringing a writ of annuity the grantee elected to take the rent as a personal annuity, and not as a rent-charge; and of a personal annuity, although a hereditament, a woman is not dowable.(*g*)

The points determined respecting advowsons, as to tenants by the Curtesy, are in this instance applicable to Dower, since Dower and Curtesy are on the same footing with regard to incorporeal hereditaments.

In *quare impedit* by the king against several, the defendant made title that the advowson descended to three coparceners, who made partition to present by turns, and that the eldest had her turn, and after the second her turn, and he married the youngest, *and had issue by her, and she died; the church became void, so it be- [*37] longed to him to present; and did not allege that his feme ever presented, so as she had possession in fact, and yet it was admitted that he may be tenant by the curtesy by the seisin of the others.(*h*)

In considering the nature of the seisin necessary to the attachment of a title of Dower, it is to be observed that a mere naked seisin without right, or defeasible by title paramount, as that of a disseisor,(*i*) abator, intruder, discontinuee,(*k*) or other person having the freehold and inheritance by wrong, is such a seisin as Dower will attach upon, as against all persons deriving title under such tortious or defeasible seisin, and until it shall be avoided by the entry or action of the person having right, or by the operation of the law called remitter.

The avoidance of the title of Dower by the restoration of the seisin under the rightful ownership will be considered in chapter viii.

(*e*) Bro. Dow. pl. 35, (cites 11 H. 4. 88.) So per Heidon. Quod non negatur. Bro. Dow. pl. 71, (cites 5 E. 4. 2.) So if the rent *descend*. Bro. Dow. pl. 66, (cites 1 H. 7. 17.) F. N. B. 149 (D).

If a rent be granted to A. and his heirs, to commence after the death of B., and the grantee dies before B., yet his wife shall be endowered. Arg. 2 Sid. 110.

The same law appears to hold even as to curtesy, for the husband has no means of obtaining an actual seisin of the rent before the day of payment. Co. Litt. 29 *a*.; Bro. Ten. per le Curt. pl. 5; Perk. sec. 469.

(*f*) Perk. sec. 373. (*g*) Vide infra, chap. vii.

(*h*) Bro. Ten. per le Curt. pl. 2, (cites 21 E. 3. 31;) Perk. sec. 468; Co. Litt. 29 *a*.; 1 Co. 97 *b*. arg. (cites 7 E. 3. 66 *a*, *b*; and 3 H. 7. 5. *a*.)

(*i*) 17 E. 3. 24, admitted by the issue; and see Litt. sec. 448. Countess of Barkshire v. Vanlore, Winch. 77; Portington's case, Clayt. 71.

(*k*) Bro. Discont. de Possession, pl. 7, (cites 24 E. 3. 28;) Bro. Dow. pl. 50; Fitz. Dow 98; Perk. sec. 420.

[*38] It is next to be observed that the law requires the seisin of the husband to be a *sole* seisin.(*l*) If *the husband during all the time of the coverture be seised jointly with another, no title of Dower will attach.

By analogy to the cases of estates determinable by condition, or by force of title paramount, it might have been supposed that the title of Dower would have been held to attach, subject only to be defeated by the survivorship,(*m*) for there is no essential quality in the nature of a jointenancy which would exclude the attachment of a title of Dower *ab initio;* and the subsequent avoidance of that title by the survivorship of the other jointenant, would have been perfectly intelligible upon the recognized principle that the survivor is in of the whole by the original feoffment or gift, and not, as to any part, by his companion; and that the estate of inheritance which the husband had in him in his lifetime is *defeated*, or *disaffirmed*, by the survivorship.(*n*) But for reasons which

[*39] it is now difficult *to discover, a distinction was admitted between the effects of different modes by which estates may become defeated; and while, in most instances, a title of Dower was held to attach, subject only to be determined by the avoidance of the estate out of which it was claimed, in others the mere possibility of avoidance was held to intercept the title of Dower *ab initio*.

This being the principle which was adopted as to the possibility of survivorship upon a joint seisin, it was at a very early period determined that if one jointenant aliens his share, his wife shall not be endowed,(*o*) notwithstanding the possibility of survivorship of the other jointenant is destroyed by the severance.

It is also to be propounded that to entitle a woman to Dower, there must be a sole seisin both of the freehold and inheritance, and if the husband has the freehold and inheritance by successive limitations, it will make no difference whether one or the other of these estates is joint.

[*40] In either case the title of *Dower will be excluded. Further observations on this point will be found in the ensuing chap-

(*l*) Lit. sec. 45; 1 Roll. Abr. 676; Fitzh. N. B. 147, (E), Cowley v. Anderson, Toth. 83, (as to curtesy.)

(*m*) In Sumner v. Partridge, 2 Atk. 46, where the estate was limited to the wife in fee, with an executory devise over on her dying before her husband, Lord Hardwicke said "there is no difference between making an estate of inheritance to cease in the wife the moment she dies [in the lifetime of the husband] and to arise in the children, and a jointenancy." The idea, that the non-attachment of a title of Dower on a jointenancy is the result rather of the change of title produced by the survivorship than of any original disability of a joint seisin to confer such a title, might be supported by several passages in the old books. See Perk. sec. 500, Toth. 183, where a will made by a jointenant who afterwards survives his companion is treated as good, though the contrary is law at this day. Swift d. Neale v. Roberts, 3 Burr. 1488, which decision, however, turned principally on the language of the statute of wills.

(*n*) Co. Litt. 37 *b*. Chief Baron Gilbert attempts to explain the rule upon feudal principles as follows:—"In that case of jointenancy, during the joint seisin, the wife's contract of dower can never attach upon the estate, because the other jointenant comes in by the feudal contract, superior to the marriage contract, so to the wife's infeudation; for though the marriage contract had been prior to the jointenancy, yet it will not attach upon it, because the estate in jointenancy is so created that it should survive. *Et cujus est dare ejusdem disponere;* therefore, though the marriage were precedent yet it cannot take place upon this infeudation." Gilb. Uses. 404. This proves nothing more than the title of dower should not prevail against the survivor.

(*o*) Fitzh. N. B. 150, (cites 34 E. 1. Dow. 179;) Bro. Dow. pl. 30, (cites 3 H. 4. 6;) and see 13 H. 4. 13.

ter on the estate in point of quantity and quality of which the husband must be seised.

Any act which determines or severs the jointenancy, so as to leave a sole seisin in the husband during the coverture, will of course remove the impediment, and render the wife dowable.(*p*)

The cases in the old books should also be noticed, where, though there was in point of fact a joint seisin during the whole of the coverture, yet this joint seisin having been avoided after the death of the husband, he is considered, by relation, to have been sole seised *ab initio*, and his wife is consequently dowable. These are the cases of joint limitations to husband and wife. As if lands are given to husband and wife, and the heirs of the husband, or the heirs of their two bodies, or to their heirs, and the husband dies; here the wife, if she does not act amounting to an agreement to the joint estate, may waive it, and bring her writ of Dower:(*q*) "and thereby (remarks Coke) in judgment of law the husband shall be said sole seised *ab initio*, and yet in truth the husband and wife were jointenants during all the coverture.—And therewith (he adds) agrees the book in 11 Ed. III., Dow. 63, where the case was, Lord and tenant of a house held by homage and 10*s*. rent. The tenant enfeoffed W., the lord granted the seignory to husband and wife in tail: W. attorned, the husband died, the seignory survived *to the wife, and she brought a writ of Dower, in bar of which [*41] the lord pleaded acceptance of homage, by which it was admitted that the writ of Dower did lie."(*r*)

A query is made by Perkins(*s*) whether, if the grant is made unto the husband and wife *for the life of the husband*, the remainder unto the right heirs of the husband, the wife can disagree, because her estate had determined by the death of the husband, and it had been said that a disagreement cannot be unto an estate after the estate is determined. "But (he adds) it seems that in this case the wife may disagree by bringing a writ of Dower, notwithstanding the estate were determined, for otherwise by such means the wife might be ousted of her Dower in every purchase made by her husband, and yet during the marriage, she is always by law under the government of the husband in such manner and form as that she cannot give away any manner of profit arising out of the lands without the leave of her husband, and she cannot disagree unto the same estate during the marriage."(*t*)

Although a *sole* seisin is necessay in order to confer a title of Dower, it is not requisite that it should be a seisin of the entirety. A sole seisin of the freehold and inheritance, in any particular share or purparty of lands, either as a tenant in common, *in coparcenary, or otherwise, will be subject to the attachment of Dower, to the [*42] extent of the share of each tenant, in respect of whose relation, as husband, to any particular woman, that title can accrue.(*u*)

With the exception of the cases to be presently noticed, in which the seisin of the husband is only for a *transitory* instant, any period of

(*p*) See Gilb. Uses, 404. Perk. sec. 337.
(*q*) The bringing of the writ is of itself a disagreement. Perk. sec. 352.
(*r*) 3 Co. 27, and see Perk. sec. 352, (cites T. 11 E. 3. 63. E. 1 E. 3. 15,) 1 And. 350.
(*s*) Sect. 352.
(*t*) Perk. sec. 353, (cites T. 43 E. 3. T. 19 E. 3. Dow. 94. T. 9 E. 3. 29.)
(*u*) Litt. sec. 45. Co. Litt. 37 *b*. 1 Roll. Abr. 676. Sutton v. Rolfe, 3 Lev. 84.

time, however short, during which the seisin may subsist, will afford a foundation for the attachment of a title of Dower. In the case of Dower at the common law, it is wholly unnecessary that the seisin should *continue during the coverture*, as is usually necessary to confer a right to freebench by the custom.

There are several instances in which a seisin in the husband, though but for an instant of time, will confer a title of Dower, as where lands descend upon a person who is married, and a stranger abates in the instant of the ancestor's death; the wife of the heir will notwithstanding be entitled, by reason of the seisin which her husband had in the intervening instant.(*v*)

In the case of Broughton v. Randall(*w*) a father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father; both *father and son were attainted of felony, and executed at the same time, being both hanged in one cart, and the son had no issue of his body: and it being proved by witnesses that the father moved his feet after the death of the son, it was found by verdict that the father was seised of an estate in fee of which his wife had right to be endowed, and the wife had judgment accordingly.

[*43]

The qualification to this rule is where the seisin of the husband is for a *transitory* instant; that is to say, where the same act which gives him the estate conveys it also out of him again.(*x*) To this principle are to be referred the following cases in the old books:

If *cestui que use*, after the statute of 1 Ric. III. and before the statute of 27 Hen. VIII., had made a feoffment in fee, his wife should not be endowed.(*y*)

"If the husband and another are jointenants in fee, and the husband makes a feoffment of his moiety, his wife shall not be endowed of this, for the husband had a sole estate but for an instant.(*z*)

"If lessee for life leases for the life of another, his wife shall not be endowed, for he gains this fee in an instant."(*a*) And "if tenant for life makes a feoffment in fee and dies, the wife shall not have Dower, for though the husband gave fee simple by *alienation, yet he was never seised in fee so as she might have Dower."(*b*)

[*44]

But it seems doubtful whether in these cases the widow may not estop the feoffee to plead *ne unques seisie que* dower, &c. by the feoffment.(*c*) If a tenant for years, or at will, makes a feoffment in fee, it is clearly admitted that the feoffee is estopped to aver that the feoffee was not seised *quoad* Dower, and it is therefore said in the books that his wife is dowable.(*d*)

(*v*) See p. 31, supra.

(*w*) Noy, 64. In the short note of the case in Cro. Eliz. 503, it is said that the father and son were jointenants to them and the heirs of the son, and that the son survived.

(*x*) See 2 Bl. Com. 131.

(*y*) Co. Litt. 31 *b*. (cites 27 H. 8. 23. F. N. B. 17 H. 3. Dow. 192.)

(*z*) 14 H. 4. 13 *b*. and see F. N. B. 150 (K.) (cites 34 E. 1. Dow. 179.) Co. Litt. 31 *b* Jenk. Cent. 3 ca. 1. Cro. Jac. 615.

(*a*) 3 H. 4. 6.

(*b*) Bro. Dow. pl. 30, (cites 3 H. 4. 6.) 1 Roll. 676; Jenk. cent. 3. ca. 1; Hargr. Co. Litt. 31 *b*. note (3), (cites 14 H. 4. 13.)

(*c*) See 3 H. 4. 6; 13 H. 4. 13. In Fitzh. N. B. 150, marg. the point is stated that the wife of a tenant for life who makes a feoffment in fee *shall have Dower* against the feoffee.

(*d*) See Moseley v. Taylor, Sir W. Jones 317, (cites 22 E. 4. 12,) and see 1 Preston on Abstracts, 355. Preston on Estates, 555.

"If the conuzeee of a fine doth grant and render the land to the conuzor, the wife of the conuzee shall not be endowed."(*e*)

So also where a tenant in special tail married a second wife who was not dowable of the estate tail, and afterwards made a feoffment in fee, and died, it was resolved that his widow should not have Dower; "for this livery did not gain unto the husband any new estate, but being *eodem instanti* drawn out of him, it doth not gain unto him any seisin whereof his wife is dowable."(*f*)

The same principle was recognised by Sir Joseph *Jekyll [*45] in the modern case of Sneyd v. Sneyd,(*g*) where upon a question whether certain copyhold lands were to be included in an assignment of Dower, it was contended for the wife in the affirmative, because the husband had the freehold of the copyhold estates in him as lord of the manor, which was purchased by him, and which contained as well copyhold as freehold, and by him not granted out; and that she was therefore dowable of the said copyhold; or that if he did grant them out, *the instantaneous seisin in the husband at the time of the purchase was sufficient to intitle her to such Dower*, and that no after act of his could give away that right which was once attached in her. But by Jekyll, *Master of the Rolls*, "Though no cases have been cited of either side, and seems to be a new point, yet I should think that this instantaneous seisin of the freehold of the copyhold estates in the husband will not entitle the defendant to her dower, for notwithstanding there may be no case of the same nature with this, yet it may be governed by reason and general rules of law: as for instance, the conuzee of a fine is not so seised as to give his wife a title to Dower; and in the case of a use, the widow of a trustee has been determined to have no claim of Dower from such a momentary seisin.(*h*)

If this case, however, is rightly reported, there *was no [*46] occasion to advert to this point. If the husband granted the new copies pursuant to the custom, the estates created by them would take effect by the custom, and paramount the title of Dower, although he had kept the lands in his own hands for a time and afterwards granted them out.(*i*) This point does not seem to have been adverted to.

(*e*) 2 Co. 77, and see Cro. Jac. 615; Jenk. Cent. 3. ca. 1; 2 Vern. 58.

(*f*) Amcotts v. Catherick, Cro. Jac. 615; and see Vin. Abr. 'Dower,' (G.) pl. 5; 3 Lev. 11.

(*g*) 1 Atk. 441.

(*h*) It was referred to the master to inquire whether the husband became intitled to the copyholds in question by virtue of surrenders from the tenants by copy of court-roll, or not. And whether he granted those estates out again by copy of court-roll, and not by lease for years or lives.

(*i*) Cham v. Dover, 1 Leon. 16, and see chap. xi. infra.

[*47]

*CHAPTER IV.

Of what ESTATE *in point of quality and quantity whereof the* HUSBAND IS SEISED, *a Woman will be* DOWABLE.

THE doctrine of the law respecting the estate of which a man must be seised, in order to confer a title of dower on his wife, may be thus stated by way of general proposition. The seisin must be of an estate of inheritance, conferring the right to the immediate freehold, as the result of one entire limitation, or several consolidated limitations, and not of successive limitations, conferring distinct estates by reason of an interposed estate *of freehold*, or of a protection against merger. It must also be an estate, to which the issue of the wife by possibility may inherit, or might have inherited, if living.

It is the business of this chapter to amplify and illustrate these general rules.

No estate held for a chattel interest only will confer a title of Dower. The interest of a lessee for years, being originally, and for many purposes even at this day, only a contract for the possession, does not confer from its ownership, a privilege which was bestowed upon the wives of freeholders; and terms for years, or other chattel interests, created by way of use, by devise, or limitation, ensue in their nature, and in-
[*48] cidents, the qualities of the interests from which these mere modern *modifications of owership originated. A term for two thousand years, although equally valuable in point of occupation with the inheritance, cannot confer upon its owner, or his wife, any of those privileges which the law annexed to property in land, at a period when such species of ownership was not recognized as an interest in land.

It follows *à fortiori*, that a person whose contract for possession was determinable at *the will* of the lessor, cannot confer a right of Dower. A copyholder, therefore, being, strictly speaking, a tenant at will, can never confer on his wife a title of Dower, properly so called. Under the growth, indeed, of customary privileges, as applicable to such tenants, it often happens that the wife of a copyholder is entitled to an interest in the copyhold tenement, on her surviving her husband, analogous, in its general outline, to that of a dowress at the common law. Such interest, however, is purely the creature of the custom; and to establish the title to freebench, as it is called, in a court of law, such custom must be specifically proved, as an exception or qualification to the law of the land, so far from being any part of it. The wife of a copyholder, as such, can have no title of Dower, by the Common Law.(*a*)

The very terms of the rule also exclude an estate of *mere freehold* from affording a foundation for the attachment of Dower,(*b*) although such estate be descendible to the heirs, or heirs of the body, as special

(*a*) Shaw v. Thompson, 4 Co. 30; Hob. 215, 216. 4 Co. 22.
(*b*) See Exton v. St. John, Finch. 368.

occupants; as a lease *pur autre vie*, limited *to the lessee and his heirs;(c) or, a rent granted to A. and his heirs during the life of B.(d) [*49]

Upon the same principle, a woman is not dowable of a rent reserved upon a lease for life; for although the rent goes to the heir, he takes it as incident to the reversion, and not by reason of any inheritable quality of the rent.(e) If the woman was dowable of the reversion, she would be dowable likewise of the rent, as incident to it; but the existence of a freehold lease in another person, excludes her title of Dower, inasmuch as the reversion does not confer the right to the immediate freehold.(f) This mode of stating the point assumes the lease to be made before a title of Dower could attach; but if it was made subsequent to such attachment, she is of course dowable; but then she is dowable of the land, and not of the rent, and she may defeat the lease, as claiming by title paramount. There is no privity between a dowress, and a lessee under a lease for life made subsequent to the attachment of her title.

But if the estate of the husband is in its own nature an estate of inheritance, it makes no difference *that it has a determinable quality attached to it, for the wife's title of Dower will attach, subject only, where the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband. [*50]

Therefore, a base fee, carved out of an estate tail,(g) or a qualified fee, as the Duchy of Cornwall,(h) will confer titles of Dower, as against all persons claiming those estates. Where a tenant in tail is attainted of high treason, the King becomes entitled to the estate as long as there are heirs of the body of the tenant in tail; and if the King grants this estate to a man and his heirs, the wife of such grantee will be dowable of it.(i)

It was for a long time held by the greatest lawyers, that under alienations by tenant in tail, not creating a discontinuance, or operating as a bar, viz. by grant, bargain and sale, or other *innocent* conveyance, the alience had a mere descendible freehold, simply determinable with the death of the tenant in tail. This opinion was perhaps founded on several passages of Littleton, in the chapter on Discontinuances,(k) where, speaking of such conveyances, in opposition to tortious alienations, which, as they can only be avoided by the *action* of the issue or remainder-man, are therefore indefeasible till so avoided, he treats them as conveyances passing an estate determinable upon the death of *tenant in tail; meaning nothing more, probably, than that the mere entry of the issue when their title accrued, without any thing further, avoids them. In *The case of Fines*,(l) (Pasch. 44 Eliz.) the right exposition was put upon the text of Littleton, and it was there said, that [*51]

(c) Plow. 556; Bulstr. 135 (cites 22 E. 3. 19. pl. 6; 45 E. 3. 13. *b.*) And see Bracton. 92. *b.* Low v. Burron, 3 P. W. 263; and see 1 Ves. S. 303.

(d) Cro. Eliz. 805; and see 7 H. 6. 3. *b.*; 17 E. 3. 12; 28 Ass. 3.

(e) Bro. Dow. pl. 44 (cites 7 H. 6. 3.,) pl. 60 (cites 26 Ass. pl. 38.) pl. 89. (cites M. 1. E. 6.) Perk. sec. 348 (cites 8 R. 2. 184.) Co. Litt. 32. *a.* (cites 28 Ass. 3.) Perk. sec. 467 makes a query of the point as to curtesy, but without reason.

(f) Co. Litt. 32. *a.*

(g) 3 Co. 84. *b.*; 10 Co. 96. *a.*; Jenk. 274, pl. 96; Machell v. Clarke, 2 Raym. 778.

(h) Jenk. 280. pl. 5.

(i) Plow. 557.

(k) Litt. sec. 598, 600, 606, 7, 8.

(l) 3 Co. 84.

"his intent was not that the grantee had but an estate for life, and that his estate should be absolutely determined by the death of tenant in tail, but that it was not a discontinuance; nor had the grantee any fixed or durable estate, but for the life of tenant in tail; but, that the issue after his death might at his pleasure determine it; and if the grantee in such case should have but an estate for life of tenant in tail, then the wife of such grantee should not be endowed: against which it was adjudged in 24 E. III. 28 *b.*"(*m*) So also, by the first resolution in Seymour's case,(*n*) (where the nature of the estate of the alienee of tenant in tail was fully considered,) it was held that the wife should be dowable of that estate; but whether or not from the inaccuracy of Lord Coke's report, the matter was still left upon a very dissatisfactory footing, for the inference from that resolution that the bargainee had an estate of *inheritance*, is done away by the language of the report, which represents the court throughout as treating the estate, so far as it was dependent upon the bargain and sale, as a mere descendible freehold, determinable on the death of tenant in tail, and expressly taking the
[*52] distinction *between a descendible freehold under the bargain and sale, and a base fee under the subsequent fine to the use of the bargainee. This inconsistency occasioned subsequent judges to hesitate in admitting Seymour's case as an authority on the question of Dower; and C. J. Vaughan, in particular, in an anonymous case(*o*) reported by Carter (and in which it was held that the bargainee of a tenant in tail had a mere descendible freehold,) asks, "How it is possible that such a tenant, who by the very book in the 10th report, Seymour's case, hath but a descendible freehold, how comes he to be so distinguished from other tenants that his wife shall be endowed?"—"I cannot see how she can. There is no reason to difference it from other estates of freehold, determinable upon other acts and accidents, so long as Paul's steeple shall stand." The exposition of Littleton in *The Case of Fines*, was again lost sight of in Tooke v. Glasscock,(*p*) in which it was held, that by the bargain and sale of a tenant in tail, nothing passes but an estate descendible for the life of the bargainor; but the law was finally settled upon a firm foundation in Machel v. Clarke,(*q*) (since recognized in every case which has raised the question,) where, after solemn argument, it was adjudged that the bargainee, &c. of a tenant in tail has a base or determinable fee, and his estate continues until it is avoided by the entry of the issue in tail. In this judgment
[*53] the authority of Seymour's case was recognized *as to the point of Dower, and the decision in Tooke v. Glasscock was denied to be law.

The rule has been already expressed, as requiring that the estate of the husband should confer the right to the immediate freehold; that is, the first estate of freehold, or the estate of freehold bestowing the present enjoyment, except so far as that enjoyment may be subject or postponed to terms for years, or other chattel interests.

Consequently, if there be a prior estate of freehold, either for life, or in tail, existing during all the time of the coverture, the husband never

(*m*) And so also Fitzh. Dow. 98.
(*n*) 10 Co. 95. S. C. 1 Bulstr. 165. per nom. Heywood v. Smith.
(*o*) S. Carter. 210. (*p*) 1 Saund. 260.
(*q*) 2 Raym. 778; 2 Salk. 619; 7 Mod. 18; 11 Mod. 19; 1 Com. 119.

has an estate of which his wife can be dowable;(*r*) "as if the husband makes a lease for life for certain lands, reserving a rent to him and his heirs, and he taketh wife, and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within these words *tenements)*, because there was no seisin in deed or in law of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple."(*s*) Thus also, "if there be lord and tenant by fealty and twelve pence, and the tenant lease the tenancy unto a stranger for life, and the lord take a wife, and the tenant die without heir, and afterwards the lord dieth *before the lessee for life*, the lord's wife shall not have Dower of the tenancy; but she shall be endowed of the seignory."(*t*)

A common example of this rule put in the books is the [*54] case of a person seised of lands, in which the widow of a former owner has an estate in Dower by actual assignment. As to the particular lands assigned, he is seised only of a reversion, expectant upon the estate of freehold in the dowress, and therefore his wife can acquire no title of Dower upon those lands so long as the estate of freehold subsists. And although the lands had descended to such person in possession, and he had subsequently assigned the Dower, yet, upon principles which will be considered in a subsequent chapter, the assignment of Dower will, as to the particular lands assigned, defeat the seisin of the freehold acquired by the descent, and as a consequence, all incidents of that seisin.(*u*) And if, during the life of the tenant in Dower, the owner of the reversion sells the lands which are held in Dower, although the tenant in Dower afterwards dies in his lifetime, his wife will have no title of Dower, for he had no seisin but of the reversion.(*v*)

But Dower must be actually assigned, in order to turn the estate into a reversion, although it seems to be immaterial that the assignment was against common right, as where the father is seised of three acres and dies, and the three acres descend to the son, who takes a wife, and endows his mother of one acre in allowance of all her Dower; in a writ of Dower against the wife of the father, this assignment is a good bar of the action.(*w*)

In a late case in Ireland, where lands are usually let [*55] upon leases for lives, it was referred to the master to inquire whether there was any title of Dower upon certain estates so let, upon leases made before the marriage of the claimant, and which continued during the coverture. The master reporting that the widow was not entitled to Dower, this report was excepted to, but Lord Redesdale overruled the exception, observing that the husband had not such seisin as to entitle her to Dower.(*x*)

In the case of incorporeal hereditaments, as seignories, rents, commons, &c. the *suspension* of the freehold, during all the time of the coverture, will prevent the attachment of Dower; as in the case put as to Curtesy. "If a tenant make a lease for life of the tenancy to the seigniores, who taketh a husband, and hath issue, the wife dieth, he

(*r*) Perk. sec. 340
(*s*) Co. Litt. 32. *a.* (cites 28 Ass. 3. 8 R. 2. Dow. 184. 1 E. 6. Dow. 80.)
(*t*) Perk. sec. 339.
(*u*) Co. Litt. 31. *a.* and cases cited; Perk. sec. 315; Hughes on Writs, 149.
(*v*) Hughes on Writs. 149. (*w*) Ibid. Hitchens v. Hitchens, 2 Vern. 405.
(*x*) D'Arcy v. Blake, 2 Sch. and Lefr. 387.

shall not be tenant by the curtesy, but if the lease had been made but for years, he shall be tenant by the curtesy."(*y*)

But it seems that if the suspension has not taken place previous to the marriage, but is the result of the marriage itself, the wife shall have her Dower notwithstanding. Thus, in Perkins,(*z*) "If there be lord, and a woman tenant of one acre of land by fealty, and twelve pence rent, and they intermarry, and the husband die, the wife shall be endowed of the third part of the rent by way of retainer; and yet the husband was not seised thereof in deed during the marriage celebrated betwixt them, for by the marriage betwixt them the seignory was in suspense, and
[*56] *so continued during the marriage, as to bring an action, so as it did amount unto a possession in law."

The technical rule of law requires, that the freehold and inheritance should be in the husband *simul et semel.*(*a*) They must also meet in him as one integral estate, and not as several or successive estates. But it is not necessary that they should result from one entire limitation, or that there should be a unity of title as to the freehold and inheritance. By whatever means they meet so as to become absolutely consolidated, the attachment of a title of Dower is the consequence.

It is immaterial, that an estate is in terms limited to the husband for life, with remainder to his heirs,(*b*) or heirs of his body, if, in point of construction, that remainder will operate to vest the inheritance *in possession* in the husband. The rule of construction, whenever it takes effect upon an *immediate* remainder so limited, produces a merger or consolidation of the several estates expressed by the limitations, and as a consequence, the wife becomes dowable. The same effect arises from the operation of merger in the case put by Perkins.(*c*) "If lands are given unto J. and Alice his wife, in special tail, the remainder unto the right heirs of the husband, and the wife die before issue between them,
[*57] and the *husband take another wife, and dieth, his second wife shall be endowed." Here, by the death of Alice without issue, the husband became tenant in tail, after possibility of issue extinct, and that estate being no longer privileged against merger, became consolidated and lost in the remainder in fee, so as to make him seised in fee in possession.

But the interposition of any vested estate, not being a chattel interest, between the limitation to the husband for life, and the remainder to his heirs, will, during the continuance of that estate, prevent the attachment of a title of Dower. It is not enough that the husband is seised of an estate of freehold in possession, and of an estate of inheritance in remainder or reversion in the same lands; the inheritance, as well as the freehold, must be in possession; in other words, it must be the immediate inheritance, and not an inheritance expectant upon an estate of freehold in any other person, interposed between the freehold and inheritance of the husband. And therefore, if lands be limited to A. for life, remainder to B. for life, or in tail, remainder to A. in fee, unless A. becomes seised of the inheritance *in possession* during the coverture, by

(*y*) Co. Litt. 29 *b.* (cites 1 E. 3. 6. 5 E. 3. 26.)
(*z*) Sect. 303 (cites H. 1 E. 3. 6.)
(*a*) Perk. sec. 333. (*b* Perk. 335.
(*c*) Sect. 338 (cites H. 50 E. 3. 4.) Bro. Dow. pl. 25; 46 E. 3. 24. *b.* 22 E. 5. 3; 7 H. 4. 25. *b.*; S. P. as to Curtesy, Bro. Estates, pl. 25.

the determination of the estate of B. the wife of A. will never be dowable.(*d*)

In this case, the intervening estate of freehold, although it may possibly never take effect in possession, preserves the several estates of the husband distinct, and free from the consequences of merger, and *consequently prevents the inheritance from being executed in possession. [*58]

There are other instances in which a similar protection from merger prevents the attachment of a title of Dower. As if the tenant for life leases the land to the lessor or remainder-man, *for the life of the lessor or remainder-man*, the wife shall not be endowed,(*e*) for such lease does not operate as a surrender, nor is there any merger of the particular estate, but the several estates remain distinct and unconsolidated. The reason of this is, that when a tenant for his own life makes a lease to another for the life of the lessee, the tenant for life retains a reversion, or, as it is rather incorrectly called in the old books, a possibility; and when such lease is made to the owner of the inheritance, this reversion becomes an interposed estate of freehold between the lease for life and the inheritance. Thus, if A. is tenant for life, remainder to B. in fee, and A. makes a lease to B. for the life of B.; for the purposes of merger the estate stands much in the same situation as if it had been originally limited to B. for life, remainder to A. for life, remainder to B. in fee. The whole estate not being given, it was no surrender; and it was no forfeiture, because the remainder-man was a party.

The case of a limitation of the freehold to two jointly, and of the inheritance to one of the two,(*f*) is governed by the same principle. The joint seisin *of the freehold (if created by the same deed which limits the inheritance), operates as a protection against merger, and the inheritance executes *sub modo* only. Perkins(*g*) thus puts the point: "If lands be given unto two men, and unto the heirs of the body of one of them begotten, and he who hath fee tail take a wife, and dieth, leaving him that hath the freehold, notwithstanding he that hath the freehold [afterwards] die, the wife shall not have any Dower, because the estate tail was not executed to all purposes in her husband: and yet, if a stranger hath entered after his death who hath the freehold, the issue of the donee shall have a formedon *en le discender* against him, and shall allege the esplees in his father, and so to such intent the estate was executed in the donee." [*59]

This seems to be an instance in which the law remits or qualifies its own positive rule in favor of the intention.(*h*) For were the estate tail to execute absolutely in the person to whom the inheritance is limited, the merger of the freehold for one moiety would sever the jointenancy, and thus defeat the intention of the donor. And this view of the subject affords a key to the distinction taken by the books, that if the inheritance comes to the husband by a separate conveyance, or subsequent descent, the freehold would be immediately merged for a moiety, and

(*d*) 46 E. 3. 16. *b.*; 1 Roll. Abr. Dow. pl. 9 ; Bro. Dow. pl. 6; Finch's Law, b. 2. c. 3. p. 125 (cites 40 E. 3. 15;) Eng. Lutw. 229 ; Perk. sec. 335 ; 1 Salk. 254, in Bates's case.

(*e*) 1 E. 3. 16, Bro. Estates, pl. 67; Co. Litt. 42. *a.* (cites 13 R. 2. Dow. 95. 7 H. 6. 3. 18 E. 3. 48;) 2 Roll. Abr. 496. pl. 7; Bro. Dow. pl. 17.

(*f*) Co. Litt. 182. *a.*

(*g*) Sect. 334 (cites T. 11 H. 7. 3.)

(*h*) See Dyer. 9. *a.* pl. 22.

[*60] the jointenancy consequently severed.(*i*) *In this case then, the wife would be dowable. Lord Coke remarks, that "of ancient time it hath been said,(*k*) that when lands have been given to two women, and to the heirs of their two bodies begotten, that the husband having issue, should be tenant by the curtesy living the other sister; for that, as some held, the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband to be tenant by the curtesy."(*l*) This opinion proceeded upon an application of the strict rule of law which would involve the ownership of a prior estate of freehold in that of the inheritance, without adverting to the qualification to the rule admitted in order to give effect to the intention. As two women are incapable of mutual issue, they have necessarily, under this form of limitation, several inheritances, as tenants in common, while they take a *joint* estate of freehold under the immediate limitation to them two. In this instance of several estates arising under one entire clause of limitation, admit the joint estate of freehold to merge in the inheritance, and the husbands of the women necessarily become entitled to curtesy in the respective moieties; but, if the law, in order to preserve the jointenancy, and carry the freehold to the survivor, suspends the operation of merger, this qualified execution of the inheritance excludes the attachment of a title of curtesy. To a claim under that

[*61] title, the subsisting jointure of the freehold is a *sufficient answer, although for some purposes, the freehold and inheritance are united.(*m*)

Whether or not the interposition of a *contingent* estate of freehold between a limitation to the husband for life, and a subsequent remainder to his heirs, or heirs of his body, which, if immediately following the limitation for life, would be construed to execute in the husband in possession, will prevent the attachment of a title of Dower, is a question demanding some consideration.

It is the prevailing language of the decisions and treatises, that a remainder to the heirs, or heirs of the body, so circumstanced, is executed in possession in the tenant for life, *sub modo*;(*n*) or, in other words, that the estates are consolidated or united until the happening of the contingency,—but with the qualification annexed to such consolidation, that if the contingency does happen, they shall again divide, and resume the character of several estates, so as to let in the estate originally limited

(*i*) Co. Litt. 182. *b.*; 1 Keb. 889, in Merrill v. Rumsey; Wiscot's case, 2 Co. 60.

(*k*) 17 E. 3. 51. 78; 18 E. 339; 50 E. 3; Statham, tit. Done; 50 E. 3. Feoffments and Faitz. 97.

(*l*) Co. Litt. 183. *a.*

(*m*) In stating the law on this head, the author has rather submitted to what appears to be the existing understanding of the best property lawyers of modern times, than satisfied himself of the entire consistency of that exhibition of the law, with all the cases to be found in the old books. It is perhaps next to impossible, to extract from the several reported expressions of the judges, as applied to the varieties of each particular case, any consistent and intelligible definition of the nature of estates executed *sub modo* as it is called. The student, desirous of investigating the law on this subject, will derive much assistance from Mr. Fearne's Essay on Contingent Remainders, pp. 30—36, 5th edit.; and Mr. Preston's Practical Treatise on Conveyancing, vol. iii. pp. 59—69.

(*n*) See Lewis Bowles' case, 11 Co. 80; Co. Litt. 28. *a.*; Fearne's Cont. Rem. 28; Preston on Rule in Shelly's case, 80; 3 Treat. on Conv. 113. 489.

upon that *contingency. The consolidation so occasioned would seem to be unaccompanied by merger,(*o*) for the effect [*62] *of a merger would be to accelerate the remainder limited [*63] to the heirs of the body, and by annihilating the particular estate of freehold by which the contingent remainder is supported, it would *ipso facto* destroy that contingent remainder. The consolidation which the books suppose, would therefore appear to be an exception to the law of merger;—an union of the time of two estates, without an involving of the ownership of the prior estate in that of the subsequent one. The question consequently is not merely whether an estate executed in possession, subject to be converted, as to the inheritance, into an estate in remainder, shall, in the meantime, confer a title of Dower; but whether an estate executed in possession *in a manner* only, and comprising the ownership of two distinct estates, one an estate of mere freehold, and the other a remainder of the inheritance, shall be considered as *so* executed (putting the happening of the contingency out of the question,) as to come within that description of estate upon which the law allows the attachment of a title of Dower. In a system of property-law like that prevailing in this country, it is one of the inevitable misfortunes attending the invention of any new artifice in the modification of ownership, to answer the purposes of a particular case, that it is giving birth to nearly as many fresh difficulties as there can be complications of the existing law with the anomaly thus introduced. The idea of an estate of freehold and inheritance executed in possession, and yet comprehending the distinct ownership of two successive estates, neither of them answering the whole of that description, is certainly one to *which it is a matter of some difficulty to apply the [*64] known principles of the common law. The authorities directly in point are not only contradictory, but they do not appear to have seized the

(*o*) In Mr. Preston's learned treatise on Merger, 3 Treat. on Conv. 113, this consolidation is in one passage termed a "temporary merger." It may deserve consideration, however, whether the law is not more correctly stated in a preceding passage in that page, where it is treated as a case of protection from merger. See also p. 489, same book. It is difficult to understand how any merger, properly so called can do otherwise than destroy the contingent remainder, and even assuming the avoidance of the merger by the happening of the contingency, and the consequent restoration of the particular estate, it is difficult to get over the circumstance that the contingency must happen *first*, as the inducement to such restoration, so that at the instant when the contingent remainder should vest, there is no prior estate of freehold in existence, although there may be the next instant, or in the next fraction of that instant. Lord Coke himself would hardly have gone so far as to suppose the dormant estate of freehold to have a quality of pre-science, by which it should be enabled to anticipate by any conceivable portion of time, the happening of the contingency. It comes therefore to the question, whether a preceding estate of freehold *by relation*, as opposed to an *actual* estate of freehold, will support a contingent remainder; as it is certainly open to be contended that, upon the avoidance of the merger, the particular estate and inheritance will be considered in intendment of law, as having been distinct *ab initio*. This is a point upon which the author does not recollect to have met with any authority precisely in point. The cases put by Mr. Fearne as to tenant for life, with contingent remainders over, making a feoffment in fee upon condition, and restoring the estate for life, by entering for condition broken, all suppose him to enter *before* the contingency happens. Cont. Rem. (Butl.) 349. In Purefoy v. Rogers, 2 Saund. 337, it was laid down by Chief Justice Hale, that "if the contingent remainder cannot take effect *immediately* on the first determination of the particular estate, whether it was determined by merger or surrender, or in any other way whatsoever, it will never vest afterwards, though the particular estate should come *in esse* again." But this seems too general.

precise difficulty of the case. In Cordal's case,(*p*) lands were devised to Ed. Cordal for life, remainder to his first son in tail, and so to the second, remainder to the heirs of the body of Ed. Cordal; and it is said to have been resolved, that the estate tail was not executed [in possession,] for the possibility of the mean estate that might interpose; and therefore it was always disjoined during the life of Ed. Cordal, so that of that estate his wife could not be endowed.

It is difficult to understand with precision, what the judges intended to express by this resolution. Taken in its literal extent, the resolution is certainly not law at this day, it being now admitted that for some purposes, the estate tail *is executed*, and that there is an union of the freehold and inheritance; and Cordal's case has accordingly been denied to be law on several occasions.(*q*)

In Boothby v. Vernon,(*r*) Anne Boothby was tenant for her life, with a contingent remainder to the issue male of her body living at her death, in tail male, and she had the reversion in fee *by descent*. The Court of Common Pleas, on a case sent there by the Court of Chancery, certifiedt hat the husband of Anne Boothby was not tenant by the curtesy. Upon a subsequent rehearing before Lords Commissioners Raymond and Gilbert, it was argued, that the husband *had a right to be tenant by the curtesy, because his wife was seised of the [*65] inheritance; for, though she had an express estate for life given to her by the will, yet there was no immediate remainder which possibly could vest during her life; but the inheritance was limited upon a contingent at her death, and therefore she being heir at law to the testator, it must descend to her till the contingency happen, so that she was seised of the inheritance subject to this contingent. The case was also argued upon another ground, but the court appear to have decided it without reference to the circumstance that the wife had the reversion by descent, arguing only upon the intention of the testator, that shet ook no estate of inheritance under the will; a point which was not made at the bar. Towards the conclusion indeed of the judgment, the court is reported to have put the case, that "where an estate for life is limited to a woman, remainder to her first, and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs, here it is plain that she is seised of the inheritance; yet *if she hath a son*, her husband shall not be tenant by the curtesy, because the contingent estate which is to arise upon her death(*s*) intervenes between her estate for life, and the inheritance."

The decision of Boothby v. Vernon is peculiarly unsatisfactory. The reasoning of the judges as to the intention of the testator, quite overlooks the question; such intention having nothing to do with the positive rule of law which cast the reversion *upon Anne Boothby as the [*66] heir at law of the testator, and the reference made to the case of a limitation similar in terms to that in Cordal's case, is expressly qualified by saying, "*if she has a son*;" in which event, no doubt could be entertained that the title of the husband to be tenant by the curtesy would be avoided. Indeed, this case of Boothby v. Vernon cannot be admitted as a direct authority either way, the judges having evidently

(*p*) Cro. Eliz. 315. (*q*) See 2 Saund. 386; Ca. t. Hardw. 13; 2 Barn. K. B. 279.
(*r*) 9 Mod. 147; 2 Eq. Ab. 727.
(*s*) The words "which is to arise upon her death," appear to have crept in by mistake.

treated the wife as being a bare tenant for life, with a possibility to her issue, as was observed by Lord Hardwicke in Hooker v. Hooker.(*t*)

In the last mentioned case, lands were settled to the use of William Hooker the elder for his life, remainder to his wife for life, remainder to William Hooker (his son, and heir apparent) for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to William Hooker the elder, in fee. William Hooker the father and his wife died in the lifetime of the son, who also died *without issue*, and the question was, whether his widow was entitled to Dower.

This case was twice argued during the time of Lord Chief Justice Raymond, and on each of these arguments the court were strongly of opinion that the widow had a title of Dower.(*u*) They agreed, that "where the estate for life, and the remainder in fee, are in one and the same person by the same conveyance, there shall be an opening of those estates, in order that the contingent remainder may vest. But wherever the remainder in fee *comes to* the person who has the estate for life, and there is no vested remainder between, in [*67] in such case "the contingent remainder is always destroyed, whether such coming of the remainder in fee is by the act of God, or by the act of the party.(*v*) For this purpose the Chief Justice mentioned the case of Harpool v. Kent, Sir T. Jones, 76, where there were grandfather, father, and son, the grandfather settled his estate to the use of himself for life, the remainder to the use of the father for life, the remainder to the use of his first and every other son in tail male, the remainder to his own right heirs. The grandfather died before the birth of the grandson, whereby the remainder in fee came to the father. The Court was of opinion in that case that the contingent remainder was destroyed."

After the appointment of Lord Hardwicke as Chief Justice, the case was again argued. His lordship observed that the general questions in this case were, "1st, Whether the contingent remainder was destroyed by the reversion in fee falling on the estate for life; and, 2dly, admitting that it was not, and that there might be an opening, whether this possibility would destroy the dower." He was inclined to think the remainder was destroyed. He agreed to the distinction between the several estates coming to one person by the same deed, and by distinct acts. Kent and Harpool, he observed, "was a very strong case, and in Purefoy and Rogers, 2 Saund. 380, the express opinion of Hale and the judges was, that the *purchasing* the remainder in fee by [*68] the tenant for life totally destroyed the contingent remainder, and that it could never be let in again, though the particular estate were revived.(*w*) In the present case, indeed, there was *no* DESCENT of the fee, because it was in abeyance during the life of William Hooker the elder, [but] *then* the estates came to be consolidated, and therefore he thought the contingent interest was destroyed in this case likewise. But supposing it were not so, and that there was a possibility of the estate's opening in this case to let in the contingent remainder, yet he thought the plaintiff had a good title to dower, inasmuch as it was stated

(*t*) Ca. t. Hardw. 13; 2 Barn. K. B. 200, 232, 279.
(*u*) 2 Barn. K. B. 200, 232. (*v*) This is too general. Vide infra.
(*w*) This seems to be too general. See Fearne, Cont. Rem. 5th Edit. p. 349.

that William Hooker the younger never had any issue.(*x*) The single case in the books that he found against this, was that in Croke [Cordal's case,] but in Purefoy v. Rogers, 2 Saund. 386, Lord Chief Justice Holt, who was then counsel, said Lewis Bowles's case and others were
[*69] *against it, and that it was not law; and in ejectment brought in Lord Bridgman's time, that case in Croke was denied by him likewise to be law, and accordingly he (Lord Hardwicke) did not take it to be so. Page, J. Here is nothing but a possibility which has never happened, nor can now happen, to distinguish this estate from an estate in fee; therefore he thought the wife plainly entitled to dower. Probyn, J. The distinctions taken in this case may be allowed, and yet the widow be intitled to her dower; besides, it is impossible now the contingencies ever should happen."

This case certainly did not require that Cordal's case should be overruled upon the point of Dower, and it is observable that both Lord Hardwicke and the other justices are reported to have laid stress upon the circumstance that the contingency was become impossible, which seems alone, to distinguish it from Cordal's case. The cases in which Cordal's case is mentioned to have been denied, were *both*, no doubt, (as in Purefoy v. Rogers) solely upon the point of consolidation, as to which Cordal's case certainly cannot be now supported. The judgment of Lord Hardwicke, as given above, (being what appears the preferable result of the several reports) sets the case in a somewhat different view from that in which it has hitherto appeared in the treatises. Lord Hardwicke, it seems, doubted no more than his predecessor Sir Robert Raymond, that the subsequent *descent* of the reversion upon a tenant for life would destroy a contingent remainder; but his doubt upon this case arose from an idea that the reversion did not come to the son by
[*70] *descent*, inasmuch as it *was in *abeyance* during the life of the father.(*y*) This notion being now universally exploded as to conveyance to uses, a case circumstanced like Hooker v. Hooker, might at this day be determined on the point of the destruction of the contingent remainders alone.(*z*)

The observations as to the title of Dower not being avoided by the estate's actually opening, attributed to Lord Hardwick in Annesley's report, are not only inconsistent with his Lordship's knowledge of

(*x*) In Annesley's report of the case, Lord Hardwick is made to say, "but supposing there was a possibility of the estate's opening in this case to let in the contingent remainders, yet he did not think it would *defeat the dower*. The distinctions in the law books were, that when a remainder comes in it shall *work no wrong;* he did not find that any of the books say, that if the estates opened during the tenancy in fee the wife should not be endowed." This is certainly bad law. The vesting of the contingent remainder disaffirms the seisin in fee of the husband, and, by relation, makes him seised of several estates *ab initio*. It does no wrong, because the union of the several estates was not absolute, but subject to this qualification.

(*y*) See Fearne on Cont. Rem. 5th edit. 352, for cases in which the same idea has been entertained.

(*z*) As relevant to this point, the attention of the student should be called to the distinction taken as to the effect of the descent of the reversion in destroying contingent remainders, when it descends from the person who created the particular estate, and in the same instant of time with its creation, and when not. In the former case it is held that the contingent remainders are *not* destroyed, for otherwise the remainders would be void in their creation; but where the descent of the reversion is not *immediate*, so that the remainders have had a chance of taking effect, the coalition of the life estate and reversion will destroy the contingent remainders. See Fearne, Cont. Rem. 341. Gilb. Uses by Sugden, 303, n. (2.) 3 Prest. Conv. 399.

principle, but with the mode in which he referred to that point as stated by Barnardiston.

Upon these considerations the writer doubts whether the case of Hooker v. Hooker ought to be considered as having actually over-ruled Cordal's case upon the point of Dower. In a case where no merger, or destruction of the contingent remainders has taken place, and the possibility of their vesting still exists, that point, he apprehends, is still open to decision; in the meantime it can hardly be considered *safe in practice to treat such a case as excluding the question of Dower. [*71]

On this point it is certainly open to be contended that the law, in denying to the union of the several estates the effect of an absolute merger, having no other object than the preservation of the contingent remainder, and that object being answered by holding that the estates re-open upon the happening of the contingency, and are *then only* to be considered as having possessed the character of particular estate and remainder, (*a*) there is no substantial reason for denying the right of the wife to Dower conditionally until the contingency happens, and absolutely upon its becoming impossible or failing of effect.

On the other hand there is certainly great difficulty in understanding how the existence of *one* estate, although comprising the respective times and ownerships of two estates, can in any sense fulfil the terms of the rule that a *particular estate of freehold*, and not merely the time of that estate, should be in existence at the period when the contingent remainder is to vest. This is a difficulty which the *anomalous notion of a remainder executed, as it is called, *sub modo*, inevitably involves, and which it must be left to greater lawyers to unravel. [*72] But probably the most efficient argument against the attachment of Dower in this case, is that the old books abundantly prove that at the common law a *mere possibility*, (*b*) although attached to an estate indisbutably executed in possession, *negatives* the attachment of a title in the wife, and does not merely *defeat* that title by the happening of the possibility. The case of a jointenancy of the fee is a powerful example of this. It is impossible to assign any cause why Dower should not attach, *subject to the survivorship*, but the existence of the possibility necessarily incident to a joint estate. The cases just considered, in which the execution *quodammodo* of the inheritance in one of two jointenants of the freehold does not confer a title of Dower, prove the same position. The possibility of the freehold surviving absolutely excludes an incipient title. The case of a lease by tenant for life to the reversioner, for *his* life, is to the same effect, as the old books considered the mesne reversion of the tenant for life as a mere possibility. (*c*) Until these cases can

(*a*) Chief Baron Gilbert's mode of stating the law favours this view of it.—"If a feoffment in fee had been made to J. S. to the use of a husband and wife, remainder to the eldest son [unborn] in tail, remainder to the husband and wife in tail, &c. *here is a tail executed in the husband and wife immediately;* but this doth not drown the contingent remainder; but when a son is born, the estate *opens and lets it in*, after the estate for life in the husband and wife is determined. For in Equity, the *trusts arose in this manner*, because this appeared to be the parties' intention by their own limitation, and the *statute executes the possession as the use is limited.*" Gilb. Uses, 135.

(*b*) This must however be carefully distinguished from a condition.

(*c*) Supra, p. 58.

be distinguished in principle from the possibility of a contingent remainder taking effect, and that possibility can be shown to be rather analogous to the case of a conditional or defeasible surrender of the estate
[*73] *for life to the reversioner,(*d*) it seems difficult to understand how a claim of Dower can be successful in the case under consideration.

Assuming the law to be that the wife *has* a title of Dower upon an estate executed in the husband *sub modo*, it may become a question whether, if the intervening contingent remainder comes *in esse* after her title is consummated by the death of the husband, as by the birth of a posthumous child, the estate arising under that remainder shall take effect subject to the title of Dower, or shall defeat and over-reach that title. The writer apprehends that on such remainder coming *in esse*, the husband is to be considered as having been seised of *several* estates *ab initio*, and that for all purposes of title, the arising of such remainder shall devest the execution of the estate tail, by *relation* to the situation of that remainder in the original limitations; and consequently defeat the title of Dower.

It was for some time doubted whether if the estate was limited to A. for life, remainder to B. for the life of A., remainder to A. in fee or in tail, this interposed limitation to B. conferred such an interest as would prevent the consolidation of the estate for life, and remainder in fee, or prevent the attachment of a title of Dower. This point called for a decision in the case of Duncomb v. Duncomb,(*e*) where, upon a writ of Dower, it appeared by special verdict that William Duncomb, the husband of the demandant, was tenant for life, the remainder to J. S. and
[*74] his heirs *for the the life of William, the remainder to the heirs males of the body of William, with the ultimate remainder in fee to George Duncomb, the tenant to the writ. It was argued for the demandant that the whole estate was really in William, and the remainder to J. S. for the life of William was no more than a possibility; so that if William had committed a forfeiture, J. S. might take advantage thereof for preservation of remainders, but that in the meantime the whole estate is executed in W. D. And they cited Lewis Bowles's case,(*f*) which was that of an interposed *contingent* remainder to unborn sons. But the court, upon the first argument, without any hesitation, gave judgment for the tenant. The ground of this determination was that J. S. had an actual interposed estate of freehold, and not merely a possibility. This case has ever since been considered as undoubted law, and has been sanctioned by the decisions on the common limitation to trustees to preserve contingent remainders.(*g*)

In all the cases in which the attachment of a *title* of dower is prevented by the existence of a previous or intermediate estate of freehold, the obstacle will of course cease by the determination of that estate.(*h*) As
[*75] where there was grandfather, father, and son, and on the death of the grandfather *the father entered, and assigned

(*d*) Infra, p. 75. (*e*) 3 Lev. 437.
(*f*) 11 Co. 83.
(*g*) See Dormer v. Parkhurst, 18 Vin. Abr. 413. 5 Bro. Parl. Ca. 453. 13 East, 489, and the certificate in Colson v. Colson, 2 Atk. 350.
(*h*) Co. Litt. 29 *a*. See Hughes on Writs, 179, as to the mode of pleading in such case.

Dower to the grandmother, who afterwards surrendered to him, paying ten pounds *per annum*, the father died, and his wife brought a writ of Dower against the son for Dower of the *whole land*, and recovered, "because the father had the fee and freehold conjoined in the life of the grandmother by the surrender."(*i*) So also if the tenant for life surrenders to the reversioner, upon condition, the wife of the reversioner will be dowable so long as no entry is made for condition broken.(*k*) And any grant of the estate of the tenant for life operating virtually as a surrender, although not so in form, will have the same effect; as a lease to the reversioner or remainder-man and his heirs, or heirs of his body, for the life of the lessee:(*l*) but a lease for the life of the remainder-man or reversioner will not operate as a surrender, for reasons which have been already considered,(*m*) and therefore the wife will not be dowable in that case.

So if husband and wife are tenants for life, and surrender to him in reversion, his wife shall be dowable, although the surrender is defeasible, in case of the wife surviving her husband.(*n*) The point of distinction between these cases and the case of the lease of the tenancy for life to the reversioner *for *his* life, is, that in the latter [*76] case, there is an existing legal reversion in the tenant for life, by way of interposed estate, and not merely a right of defeating the surrender upon an event.

Another example is put by Perkins:(*o*)—"If land be leased unto A. and B. for the life of C., the remainder unto the right heirs of A., and A. take a wife, and C. dieth, leaving A. and B., and A dieth leaving B., his wife shall be endowed, because the *cestui que vie* died living A. the husband, so as the freehold and inheritance are joined in the husband during the coverture." Here the joint seisin of the freehold for the life of C. prevented the remainder to the heirs of A. from executing absolutely in A., and excluded the attachment of Dower; but on the death of C. the joint seisin of the freehold determined, and the inheritance became executed in possession in A.

To let in the title of Dower, however, the particular estate must determine or be destroyed in the lifetime of the husband. Although the wife should survive the husband, and afterwards, during her life, the particular estate should determine, she would not thereby acquire any right to be endowed of that estate,(*p*) because there was no seisin *during the coverture* of such an estate as her title could attach upon.

An estate for years limited prior to the estate of the husband, or arising by the demise of a former owner, or of the husband himself, is no impediment *to the attachment of a title of Dower, since it does not prevent the husband from being seised of the *immediate* freehold, but rather protects and 'preserves that seisin.(*q*) So [*77]

(*i*) Hughes Writs 173, (cites M. 45 E. 3. 13.) Bro. Dow. pl. 17. Bro. Sci. Fa. pl. 21, (cites 42 E. 3. 9.)
(*k*) 44 E. 3. 31 *b*. 45 E. 3. 13 *b*. Bro. Dow. pl. 74, (cites 14 E. 4. 6.)
(*l*) 18 E. 3. 45. (*m*) Supra, p. 58.
(*n*) Hughes Writs (cites M. 45 E. 3. 13.) 18 E. 3. 45.
(*o*) Sect. 337. (*p*) Perk. sec. 335.
(*q*) 1 Roll. Abr. 670, pl. 7. Bro. Dow. pl. 89, (cites M. 1 E. 6). Co. Litt. 32 *a*. Jenk. 73. ca. 38. Perk. sec. 335. Finch's Law, b. ii. c. 3. p. 125, (cites 9 Ed. C. B.,) Bates v. Bates, 1 Lutw. 729, and see 1 Taunt. 410.

the suspension of a seignory, rent, common, or other incorporeal hereditaments, if only for years, does not operate to exclude the title of Dower from attaching, for the husband is still seised of the freehold.(*r*)

Neither will the interposition of an estate for years between limitations of the freehold and the inheritance (in other respects immediate) to the husband, be any prevention to the attachment of Dower.(*s*) For all purposes of *estate*, properly so called, the husband is seised of the immediate freehold and inheritance,(*t*) although with a qualification as to the enjoyment, to the extent of the interest of the termor. In all these cases, the title of Dower will attach, subject only to the term, and when the wife is endowed, she will become the reversioner, *quoad* the lands assigned to her, and be entitled to the rent, if any, reserved on the demise.(*u*) These cases were originally decided, chiefly upon the ground that, at the common law, an estate for years *was so little regarded as to be no impediment to the freeholder in prosecuting those rights and remedies to which he would be entitled if in the actual possession, or which the reversioner or remainder-man might have availed himself of against the particular tenant, if there had been no intervening estate for years. At the common law, indeed, the termor was almost wholly in the power of the freeholder, who might have destroyed his term by a feigned recovery,(*v*) and it was thought unreasonable that an interest so precarious should be any impediment to the rights of those who might at pleasure have defeated it; and Dower, it must be recollected, was formerly considered as a privilege annexed to a seisin of the inheritance, rather than as incumbrance, as it is now treated.

[*78]

These observations as to terms for years, are equally applicable to every other species of chattel interest, precedent to, or interposed between, the estates of the husband. They may postpone the enjoyment, but they do not prevent the attachment, of Dower. Therefore, where a person devised that if his personal estate should not be sufficient for payment of his debts and legacies, his executors should pay the same out of the rents and profits of his real estate; and when debts and legacies were paid, he devised his real estate to his son in tail, who married, and died before the debts were paid, and before he had any possession; it was held that the estate in the executors was but *a chattel interest, and as such could not hinder Dower.(*w*)

[*79]

Lastly, the estate of the husband must, as to its inheritable quality, be such, that the issue of the husband by the particular woman who claims to be entitled to Dower (whether any such issue is had or not), may by possibility inherit, or might by possibility have inherited, as heir to the husband.(*x*)

Therefore, "if tenements be given to a man and the heirs which he shall beget of the body of his wife—although the husband die without issue, the same wife shall be endowed of the same tenements, because

(*r*) Co. Litt. 29 *b*.
(*s*) Perk. sec. 336. Bates's case, 1 Salk. 254. 1 Raym. 326, 1 Lutw. 729, and see Godb. 42.
(*t*) Perk. sec. 336. (*u*) See chap. xvi. infra.
(*v*) See Co. Litt. 46. 2 Inst. 321. 2 Raym. 785.
(*w*) Hitchen v. Hitchen, 2 Vern. 403 ; Cordell's case, 8 Co. 96. *a*.
(*x*) Perk. sec. 301; Litt. sec. 52.

the issue which she by possibility might have had by the same husband, might have inherited the same tenements. But, if the wife dieth, living her husband, and after, the husband takes another wife, and dieth, his second wife shall not be endowed in this case."(*y*)

The material point is that the circumstances must concur that the issue are, or would be, inheritable as heir to the father, and also as heir to the estate in respect of a seisin of which during the coverture, the title of Dower is claimed; for, although they may be inheritable to the husband in respect of some other estate which he has in him in right, or in remainder, this alone will not entitle the wife to Dower: as, "if a man be tenant in fee tail general, and make a feoffment in fee, and taketh back an estate to him, and to his wife, and to the heirs of their two bodies, *and they have issue, and the wife dieth, the husband taketh another wife and dieth, the wife shall not be endowed, for, during the coverture, he was seised of an estate tail special: and yet the issue which the second wife may have by possibility may inherit.(*z*) Here, the only estate of which the husband had a seisin during the coverture of the second wife, was not inheritable by her issue, being an estate to him and the heirs of the body of himself and his first wife; and yet, the issue of the second wife were inheritable to the elder estate tail, being a tail general, and, in default of issue of the first wife, would actually succeed to that estate. [*80]

It should be observed, that the language of Littleton in treating of this subject is, "So as *by possibility it may happen, that the wife may have issue by her husband*, and that the same issue may by possibility inherit," &c.(*a*) As contra-distinguished from curtesy, it is *not* essential to the attachment of Dower, that the wife should actually have issue by her husband: *the possibility of issue is sufficient. She must, however, be of such an age at the death of her husband, as to have had a possibility of conceiving, or bearing issue, and this age the law contemplates to be that of nine years.(*b*) Till she is of that age, the law does not consider her deserving of Dower, in respect of her incapacity to have issue. On the other hand, the law will not set any bounds to the possibility of having issue at the most advanced age, and therefore it has been decided, that though a man marries a woman of one hundred years of age, she shall have her Dower, though by possibility of nature she cannot have issue;(*c*) for, as Lord Coke observes, "seeing that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that to be [*81]

(*y*) Litt. sec. 52, and see Bro. Dow. pl. 36. S. P. (cites 12 H. 4. 1.)

(*z*) Co. Litt. 31. *b*. (cites 41 E. 3. 30. 44 E. 3. 26.) Perk. sec. 302, (cites M. 14 E. 4. 30.) 2 Roll. 'Remitter.' (K) pl. 4; Bro. Dow. pl. 18 (cites 46 E. 3. 24.) pl. 9. The case as put by Perkins is liable to mislead the student. "If tenant in tail," says he, "take a wife, and enfeoff a stranger, and take back an estate unto him and his wife in special tail, and the wife die, and he marrieth another wife, *and hath issue*, and dieth; the second wife shall not be endowed, yet the issue is emitted unto the general tail." Now, if this was intended of the issue of the second wife, who are the only issue mentioned, and which the context seems to require, there could be no remitter, because the defeasible estate tail never descended on such issue, they not being inheritable to it. The real case, however, in the books, was that the issue was by the first wife, which removes the difficulty.

(*a*) Sect. 52. (*b*) See p. 17, supra.

(c) 2 Danv. 652 (cites 12 H. 4. 2. *b*.) Bro. Dow. pl. 36 (cites 12 H. 4. 1.) Co. Litt. 40. *a*.; Roll. Abr. 657.

impossible, which by nature was possible: and in my time (he adds), a woman above three-score years old hath had a child, and *ideo non definitur in jure.*"(*d*)

It appears from Tothill's Reports, that a bill was filed in the Court of Chancery in the reign of James I. to enjoin the prosecution of a title of Dower, on the plea, that the husband was past memory, at the time of the marriage, but the bill was dismissed to law.(*e*)

Assuming, that the estate of the husband is of such a nature in point [*82] of quality and quantity as to *be subject to the attachment of a title of Dower, and is not protected by any legal jointure, it is to be remarked, that the consequence of law is inevitable, and that the attachment of the title cannot be restrained or prevented by any proviso or qualification contained in the gift of the estate. The continuation of the estate of the husband by the widow is considered by the law as a portion of the quantity of enjoyment designated by the terms of the limitation itself; any attempt therefore to curtail this right is repugnant to the grant of the estate. Thus, it was said by the court, in Sir Anthony Mildmay's case,(*f*) "if a man makes a gift in tail, on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue, shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant, and against law, because by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore, it is repugnant to restrain it by condition, for that would be to give a power, and to restrain the same power in one and the same deed."

[*83]

*CHAPTER V.

On the modes of limiting lands ON CONVEYANCES *to* PURCHASERS, *so as to* PREVENT *the attachment of* A TITLE OF DOWER.

THE foregoing discussion of the circumstances of ownership under which a title of Dower will attach, naturally leads to the consideration of the different limitations which have been adopted by conveyancers to protect purchased lands from the attachment of this incumbrance.

The multiplicity of transactions in modern times, in which real property becomes the subject of transfer from hand to hand, has made it an object of great anxiety among professional men to invent modes of conveying estates so as to intercept the title of Dower, and the consequent expense of levying a fine upon any subsequent sale or mortgage.(*a*) Some of the earliest methods adopted to accomplish this object appear to have been those of conveying the fee to a trustee, in trust for the pur-

(*d*) Co. Litt. 40. *a.* (*e*) Pennington v. Cook, Toth. 81. 3 Jac. *lib.* B. f. 6.

(*f*) 6 Co. 41; and see Dy. 343. *b.* in the Earl of Arundel's case, Shep. T. 128; Co. Litt. 224. *a.*

(*a*) See several of the old forms of limiting estates so as to prevent Dower, in 5 Pow. Prec. by Barton, 14.

chaser, or to a trustee and the purchaser jointly in trust as to the trustee for the purchaser. Both these modes were highly objectionable, on account of the expense and trouble of getting a conveyance from the trustee or his heir, who might be an infant, a married woman, a person *unknown, or residing abroad, or at a distance; besides the risk of the legal estate escheating to the crown for want of [*84] heirs of the trustee, or passing by general words in his will, and becoming limited in tail, so as to require a fine or common recovery as part of the conveyance, or even, during the non-existence of a tenant in tail, an act of parliament. Besides, where the estate was limited to the purchaser and trustee jointly, if the trustee died in the life-time of the purchaser, the object of the precaution was at once defeated, as the purchaser became sole seised, and his wife consequently dowable. To avoid the inconvenience of infant heirs, &c. the lands were sometimes conveyed to the purchaser and a trustee, and the heirs and assigns of the purchaser in trust, as to the estate of the trustee for the purchaser; but, the same danger attended this method of the husband becoming ultimately sole-seised. "To obviate these inconveniences (it is remarked by Mr. Sugden), it became usual to convey the estate to such uses as the purchaser should by deed or will executed in a particular manner direct or appoint, and in default of appointment, to the purchaser, his heirs and assigns. This limitation was suggested by the observation, that the exercise of such a power defeated the estate limited in default of its execution. But after some time, it was settled that estates limited in default of the execution of such a power were vested, subject to be devested by an exercise of the power. It then became a question whether, as a right of Dower attached on the estate in fee, which was vested until appointment, a subsequent exercise of the power *could drive it out—a question upon which learned men still continue to [*85] differ.(*b*) It was also doubted whether the power was not merged in the fee, although it is now settled that it is not."(*c*.

The improvement upon this form of limitation now generally adopted seems to have been introduced by Mr. Fearne, and was suggested to him by the decision in Duncomb v. Duncomb already noticed. In a note to the fourth edition of the Essay on Contingent Remainders,(*d*) he observes, that that case "suggests a mode of preventing dower's attaching upon purchased lands, which at the same time that it puts the whole estate completely in the purchaser's power, without any recourse to the trustee, vests the legal freehold in him solely, and on his decease, leaves the legal inheritance to his heir, absolutely discharged from the medium of any trust. For this purpose, the lands may be limited to the use of his appointees, &c. in the fullest manner, and in default of appointment to the use of him and his assigns during his life; and from and after the determination of that estate by any means in his life-time, to the use of some person and his heirs during the natural life of the purchaser, in trust for him and his assigns; and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser his heirs and assigns for ever." It is observable that in this form the limitations of the use are alone sufficient

(*b*) See this point discussed in chap. viii, infra.
(*c*) Note to Gilb. Uses, by Sugden, p. 321. (*d*) Vol. i. p. 509.

[*86] to prevent the attachment of a title of Dower, without the aid of the power of *appointment; but the advantage of retaining that power is, that it enables the purchaser at any time to put an end to the estate limited to the trustee, and, without his concurrence. to vest the entire fee in a third person. In addition to this general power of appointment, the purchaser has, under this form of limitation, the immediate freehold, conferring on him the present legal right of bringing ejectments, making distresses, &c. in his own name. There is next the limitation to the trustee for the life of the purchaser, which, as a vested estate of freehold, prevents the consolidation of the estate for life and remainder in fee of the purchaser, and by preserving the distinct characters of those several estates, prevents the attachment of any title of Dower. The ultimate limitation of the fee to the purchaser vests the legal inheritance in him, so that if he dies without exercising his power of appointment, or having only created particular interests by it, the inheritance will be vested in his heirs or devisees, uncumbered with any title of Dower, and discharged of the estate of the trustee, that estate having determined by the death of the purchaser.

These limitations, with some slight variations,(*e*) have ultimately been adopted by the profession at large; but, there is perhaps no subject within the whole scope of conveyancing, which has experienced more discussion in practice, or which was so long exposed to the cavils and criticisms of the half-informed. But even conveyancers of great eminence have differed upon many minor points, arising upon the framing

[*87] of these limitations, and the practice is not *yet so uniform as might be wished. The prior limitation to such uses, &c. as the purchaser shall appoint, generally requires that the appointment shall be executed in the presence of two or more witnesses. On this point, Mr. Butler observes, "that no good reason can be assigned for requiring any number of witnesses to the execution of the deed by which the power is executed; it seems therefore sufficient to require, that the deed shall be *legally* executed."(*f*) On the other hand it is remarked by Mr. Sugden, "It is not of course essential that any solemnities should be required to the execution of the power, but the editor's impression is that they ought never to be omitted. It is, even with this precaution too frequently a question whether a deed operates as an execution of the power, or as a conveyance of the interest. The ceremonies required to the due execution of the power always afford some clue to solve this question, for if they are adhered to in the deed executing the power, that is some evidence of the intention."(*g*) The more prevailing practice certainly is that which is recommended by Mr. Sugden, but in later drafts of a conveyancer of great eminence, an attestation by "*one*, two, or more" witnesses is all that is required, which, as almost all deeds are attested by at least one witness, seems to be out of the scope of the reasoning advanced by Mr. Sugden in favour of the attestation clause, and to bring it very nearly within the generality of the words recommended by Mr. Butler.

(*e*) See numerous forms of uses to prevent Dower, in 5 Pow. Prec, 14. and 1 Bart. Prec. 522. n.

(*f*) Note to Fearne on Cont. Rem. 5th edit. p. 347.

(*g*) Note to Gilbert on Uses, 3d edit. p. 324.

*Till of late years, the forms of the most eminent conveyancers extended the power of appointment to the *will* of the purchaser, as well as to *deeds or instruments*, and even now, those commonly found in the offices of attornies are so penned. This is a defect in those forms which improving practice is every day exploding. It not only uselessly increases the length of the clause, but it is calculated to raise doubts whether the will of the purchaser operates as a devise under the ownership, or as an appointment of the use, which in some cases may involve a title in difficulty. No advantage can be derived from it, as the purchaser has the entire ownership in himself, and for all purposes of testamentary disposition, can do every thing by devise of the land, which he could do by appointment of the use. The clause seems to have been thoughtlessly adopted form the old forms, in which the lands were limited to such uses as the husband should appoint and subject thereto, to himself in fee. Now here, assuming that the power of appointment can be relied on at all, there was an obvious utility in extending it to an appointment by will, as well as by deed, for as in default of appointment the wife was dowable, she would otherwise have been enabled to defeat the testamentary disposition of the husband, made under the ownership. This point may deserve attention, if it should ever be decided that the exercise of a power of appointment alone is a sufficient bar to the claim of Dower, and the uses should be framed accordingly. [*88]

Another modern improvement in the penning of *these uses is the omission of the word "signed," among the formalities prescribed for the execution of the power.(*h*) The old forms used generally to run "signed, sealed, and delivered in the presence of, and attested by two or more credible witnesses." The reason of discarding this word is to be found in the cases which have determined that to the valid execution of a power so penned, it is necessary that the fact of *signature* should be attested by the witnesses,(*i*) while the common form of attestation merely expresses that the deed was "sealed and delivered." [*89]

In point of consistency, an ultimate limitation to the heirs and assigns of the purchaser seems preferable to a limitation to the purchaser, his heirs and assigns; and in legal effect it is equally unobjectionable, the limitation to the heirs being vested in the purchaser by force of the rule in Shelley's case. It appears, however, that the limitation to *the purchaser*, his heirs and assigns, was adopted in practice to meet the doubts of ignorant practitioners, who supposed the limitation to the heirs to give them an estate by purchase.(*k*)

Of late years, it has been a growing practice in conveying lands to uses to prevent Dower, to give the seisin to the purchaser, and not to the trustee. The grant is therefore made to the purchaser, habendum to the purchaser and his heirs, to the use *of such persons, &c. as he shall appoint, &c. This practice has some advantages. It saves the insertion of the nominal consideration paid by the trustee, [*90]

(*h*) It is to be regretted, that this word is still retained in the collection of printed precedents now most generally in use in the offices of attornies. See 1 Bart. Prec. 527.

(*i*) See these cases discussed in Sugd. on Pow. 231.

(*k*) See Mr. Sugden's note to Gilb. on Uses, 3d edit. p. 324.

and of the formal clause in the witnessing part, "on the nomination of the said (purchaser), testified," &c.; and it substitutes the purchaser for his trustee in the lease for a year, thereby giving the lease and release greater identity. But, the main reason of its introduction is, that the authorities all agree that the deeds do not appertain to *cestui que use*, but to the feoffees by the common law, and the statute does not transfer them to him,(*l*) which is the ground that a *cestui que use* is allowed to plead the deed without profert.

On the other hand, it is possible to contemplate cases in which the old practice of giving the seisin to the trustee may have its advantages; as if the uses should fail of effect as legal estates (which not unfrequently happens,) by reason of the conveyance operating as the appointment of an use, and giving the legal estate to the trustee to uses, instead of to the uses declared upon his seisin.(*m*) Here, if the *purchaser himself be the releasee, he will have the legal fee, and beneficial ownership, and his wife will consequently be dowable; while if the seisin had, in terms, been given to the trustee, the legal estate in him would have prevented the attachment of Dower, although the uses should have failed. The practice has also the disadvantage of being liable to mislead unskilful practitioners, when the intervening limitation to the trustee for the life of the purchaser is omitted, as is sometimes done when great brevity is an object, and the estate is conveyed to such uses as the purchaser shall appoint, and subject thereto to himself in fee. In this case, if the seisin was given to the purchaser instead of to a trustee, the deed would operate wholly by the common law, and the power would be nugatory.(*n*) The wife would consequently be dowable.

[*91]

Under the common form of uses to prevent Dower, the owner may, by an appointment in exercise of his power, at once defeat the estates limited to himself and his trustee, and confer the entire fee upon the person in whose favour the appointment is made. It is, however, the constant practice for a purchaser to take a conveyance under the ownership as well as an appointment,(*o*) and this practice *proceeds not merely upon an adherence to form, or from abundant caution, but upon the ground that the power, being a power appendant, may have been suppended or destroyed by some act unknown to the purchaser. But where a power of appointment was effectually created by the deed conveying the lands to the vendor, many conveyancers of eminence discourage as much as possible the practice of making *the*

[*92]

(*l*) See Whitfield v. Fausset, 1 Ves. S. 394.

(*m*) The miscarriage alluded to arises in cases where the vendor is seised under uses to prevent dower, and upon a conveyance to a purchaser, the appointment is made to *the purchaser or his trustee* in fee, to the uses thereinafter declared, instead of being immediately *to the uses*, &c. As the appointment confers an use, the consequence of the doctrine that there cannot be an use upon an use is, that the uses to prevent dower subsequently declared are mere trusts, so that if *the purchaser* is the releasee, he takes the whole legal and equitable interest. It has sometimes happened in practice, that this error has occurred on two successive sales of the same property. Now on the second sale, the wife would not be dowable, for the former conveyance having conferred no power of appointing *an use*, the subsequent transaction, although in form containing an appointment, operates merely as a lease and release to uses.

(*n*) See Goodill v. Brigham, 1 Bos. and Pul. 192.

(*o*) The writer has known instances in country practice, and where brevity was an object, that the conveyance has been taken by an appointment alone, but he apprehends them to be extremely rare.

trustee a party to the conveyance to the purchaser; and probably in the greater number of cases, persons preparing drafts on behalf of purchasers uniformly omit the trustee. In point of convenience it is certainly highly desirable that this practice should be uniformly established, as, in transactions so multifarious as purchases and mortgages are at this day, the aggregate expense and trouble of procuring the concurrence of the trustees to prevent Dower, or their representatives, is a matter of no small consideration. But it sometimes happens that a cautious purchaser insists upon his right to have the trustee made a party, and it has been made a subject of discussion how far this requisition is sustainable. In a case which occurred many years since, lands were limited to such persons, &c. as A. should appoint; and in default of, and until such appointment, to the said A. for life, and in case E., the wife of the said A., should survive him, then to B. and his heirs during the life of the wife, in trust for A., his heirs, and assigns, and to prevent Dower, and after the death of the survivor of A. and his wife, remainder to the heirs and assigns of the said A. for ever. Upon a subsequent sale by A., two professional gentlemen of great respectability were of *opin- [*93]
ion that the concurrence of the trustee was not necessary. Their reasons were as follows:

"The conveyance is by way of use executed in A. for life, with power to dispose of the fee. No estate or interest can vest in B. till the contingency should happen of A.'s dying without making an appointment; and as this very conveyance to the purchaser (when made as from A. alone) is an appointment, after it is executed; the contingency can never happen. B. having therefore no interest in the premises, either in law or equity at present, nor any possibility of having any after A. shall have made such conveyance, I conceive he is not a necessary party to join in the conveyance with A. to a purchaser.

Nov. 11, 1748. "Hu. Marriott."

"I think, that as the power is a plain simple power, and is by the conveyance fully executed, that B. can have no interest; and therefore it is not necessary to make him a party.

Nov. 21, 1748. "R. Wilbraham."

It must be admitted that neither of these opinions embraced the real points of the case. The following opinion was afterwards given by Mr. Booth:

"If the uses had been to A. for life, then to such persons and for such estates as he should appoint, and then the words had been '*in default* of such appointment *to B. during the life of the wife,' or for [*94]
any other greater estate, I conceive it is plain from Leonard Lovie's case, 10 Co. 78, and Sir Edward Clere's case, 6 Co. 68, the use to B. would have been contingent, and the fee might be then in abeyance, nobody being appointed to take the fee or remainder but on the contingency of A.'s making no appointment. But in the present case the uses are, in the first instance, to such persons and for such estates as A. shall by deed or will appoint; and then the words are *and in default of and until such appointment*, &c. to the use of A. for life; and in case his wife survives him, then after A.'s death to B. and his heirs during the life of the wife; remainder over in fee. Here the uses to A.

and B. cannot be contingent; first, because then the freehold would be in abeyance, which the law will not allow; secondly, because the deed expressly vests the freehold and inheritance in the respective takers immediately by express limitation; for the words are, until such appointment shall be made, to the use of, &c. so that in the interim the use vests in A. and the remainder over, until he makes an appointment, leaving an opening for the interposition of the uses which are to arise under any appointment by A. in virtue of his power, whenever that shall be, as in Lewis Bowles's case, 11 Co.

"And this case is the same as if the uses had been expressed thus.—Until A. shall make an appointment, in virtue of his power after mentioned, to A. for life, remainder to B. and his heirs *pur auter vie*, the remainder or reversion to A. in fee; provided that after A. shall make
[*95] an appointment by *deed or will, the releasees shall stand [seised] to the use of such persons and for such estates as A. shall in such deed limit or appoint. And this is the case of every marriage settlement—'Until the marriage to J. S. in fee, and after to uses for the benefit of the husband and wife, and their issue.' It is said, that notwithstanding this reasoning may be right with respect to the estate limited to A. which may be a vested use, yet that it cannot be so with respect to B. whose estate is limited upon a contingency, viz. if C. survive her husband. I answer, that these words cannot make B.'s estate contingent, since this contingency must be necessarily implied, if you give him an immediate vested remainder during the wife's life; and if this were not so, every remainder-man for life, after an estate previously limited to another for life, would take by way of contingent remainder.

"It only remains for me to say, that all I have said tends to shew there is an actual estate and interest vested in B. as well as in A. and that therefore B. is a necessary party to join in a conveyance to the purchaser.

"And although it be true, that if A.'s power remains entire, untouched, unextinguished, or unsuspended, then the use may well enough arise to the purchaser; yet I may venture to affirm I never saw a deed settled with good advice but what not only contained an appointment in virtue of the power, but also a grant by way of conveying the estate and interest of the vendor, and all claiming under or in trust for him. And if this
[*96] were not so, many of *the most operative words and clauses would be left out in all conveyances.

March 18, 1748. "J. Booth."

Mr. Marriott, counsel for the vendor, and Mr. Booth, counsel for the purchaser, still differing in opinion, they agreed to be determined by Mr. Filmer, who gave the following opinion:—

"The limitation to B. and his heirs during the wife's life being to prevent her title to Dower, I apprehended, that B. is only a trustee for A. the husband, and that the wife has no interest. If so, then if the purchaser requires A. not only to limit and appoint the estate by virtue of his power, but also to convey the remainder or reversion in fee (which I think is reasonable he should do, lest he may have done any act to extinguish his power,) I see no inconvenience can happen to B. if he should join in the conveyance by the direction of A. if the purchaser

requires him so to do; though I cannot say B.'s joining will much mend the title, because B.'s remainder seems to be a contingent remainder, and not vested; and consequently he has no estate in him to convey.

"Bev. Filmer."

"Upon further consideration of this case I am inclined to think, that, notwithstanding the contingent words, the remainder to B. is a vested remainder; because the contingency must happen upon the determination *of the particular estate on the death of A.; and therefore, for the reasons before mentioned, I think B. should join in the conveyance with A. [*97]

April 10, 1749. "Bev. Filmer."(*p*)

In consequence of this opinion the trustee was made a party. The case certainly was not treated with particular success by the gentlemen who advised on the part of the vendor. Mr. Marriott's opinion that the limitation to the trustee was contingent upon A.'s dying without having appointed, is clearly not law at this day, and therefore can have no influence in the discussion of the point. The strict question is whether a purchaser objecting to the title under an appointment alone, is or is not bound to show that the power is suspended or extinguished. If he is entitled *strictissimi juris* to any conveyance at all, he would seem to be entitled to the concurrence of all persons who have an interest to convey.

And although the case of a vendor himself refusing to do more than appoint, would certainly be received by the courts with a very different feeling, both on account of its unreasonableness, and its hostility to uniform practice, yet if a purchaser has *a right* to a conveyance from a person having one portion of the legal estate subject to the power, it is difficult to show why he has not also a right to a conveyance from a person having another portion of that estate, subject to the same power.

*There are certainly cases in which a purchaser would be compelled to take a title solely under the exercise of a power, unless that power could be impeached, and in which no one ever thinks of making the objection in practice that there is an appointment only, and not a conveyance. The cases of titles under powers of sale and exchange, or powers of revocation and new appointment, where the estate subjected to the power is limited in strict settlement, furnish examples of this. These cases however afford the distinctions, either that a conveyance *cannot be had* under the ownership, or that such conveyance will not be valid without the expense of a fine or recovery. The author is not aware of any case which has decided whether a purchaser under a title so circumstanced could refuse to execute his contract without a conveyance, upon offering to pay the expense of a recovery. Another example is to be found in the case of a power of sale contained in a mortgage. It has been decided by Lord Eldon, that it is no objection to the title that the mortgagor will not join in conveying to a purchaser.(*q*) In this case, however, the danger of the power being suspended or extinguished was too remote to enter into consideration, and [*98]

(*p*) 2 Ca. and Op. 29.

(*q*) Clay v. Sharpe, Sugd. Vend. Appx. No. 14, and see Corder v. Morgan, 18 Ves. 344.

the case was discussed merely with a view to the supposed equity of the mortgagor to control the sale.

In the absence of any authority distinctly applicable, the impression of the writer is that, strictly speaking, a purchaser is entitled to the concurrence *of the trustee in every case in which that trustee [*99] is *sui juris*, and can convey without the expense of a fine, or an order of the Court of Chancery; but if the trustee is dead, and his heir is an infant,(*r*) or a married woman, he apprehends that a purchaser insisting upon their concurrence, would be required to show that the power was not exercisable, or at least that a title under it was open to be impeached upon some specific ground.

[*100]

*CHAPTER VI.

Of Titles of Dower *in the wives of* Trustees and Mortgagees, *and of equitable relief against the same.*

Where the husband has the legal estate in fee of lands, as a trustee for another person, as courts of law connot take notice of the trust, the wife might at law successfully prosecute her title of Dower. So where the husband is a mortgagee in fee, *after condition broken*, the wife would, at law, recover Dower, upon proving the legal seisin of her husband under the mortgage deed; and the estate of the mortgagee having once become absolute by breach of condition, no subsequent acceptance of the mortgage money, or reconveyance of the lands, by the mortgagee, could defeat the wife's *legal* title of Dower.(*a*) Hence it was the ancient practice, in mortgages, to join another person with the mortgagee in the conveyance, to avoid the attachment of the legal title of Dower. So if the husband had the estate upon condition that he should enfeoff another, and he performed the condition, the feoffee would, at law, take subject to the Dower of the wife;(*b*) the *feoffee being in by [*101] the husband, and not by title paramount; and accordingly in Brooke's Abridgment there is a "Mem. That in feoffments to make estate over or to re-enfeoff the feoffor, this shall be made to a man sole, or to a chaplain who has no feme, for if it be to a man who has a feme, and she survives, she will or may have Dower."(*c*)

In modern practice it is uniformly considered that the wife, whether of a mortgagee or trustee, who should establish her title of Dower at law, would in equity be subject to the same trust or redemption as her husband; and consequently that a court of equity would restrain the widow of a trustee or mortgagee from prosecuting her legal title of Dow-

(*r*) To avoid this inconvenience, some gentlemen limit the estate to the trustee, his executors and administrators. See Sugden on Powers, 187, note.

(*a*) Bro. Dow. pl. 11, (cites 42 E. 3. 1.) Vin. Abr. Dow. (G. 2.) pl. 5. Perk. sec. 392.

(*b*) 28 Ass. 4. Bro. Dow. 62. 1 Roll. 678, l. 36. Litt. sec. 357. It is therefore said that if a man sole be enfeoffed upon condition to enfeoff another, and before he has performed the condition, he takes a wife, the feoffor may enter for condition broken, because, says Littleton, "the tenements be put in another plight than they were at the time of the feoffment upon condition, for that then no such wife was dowable," &c. Litt. sec. 357.

(*c*) Bro. Assurances, pl. 3.

er, where the husband had been redeemed, or had conveyed the legal estate at the direction of the *cestui que trust*.

It was never doubted that the widow of a *mortgagee* would be subject to redemption;(*d*) the equity of a mortgagor extending against persons coming in by every species of title; but the old books differed upon the question whether a dowress should be bound by a mere trust.

On this point some of them made a distinction *between Dower and Curtesy, holding that tenant by the Curtesy [*102] being in in the *post*, could not be seised to an use [i. e. trust]; while tenant in Dower, being in in the *per*, might; for she continued the estate of her husband, and under the same trusts and agreements.(*e*) In another place it is remarked, that a tenant by the Curtesy claims by the general law of the kingdom, while a tenant in Dower claims by the marriage agreement, and a private contract is the origin of her title;(*f*) while in a subsequent page of the same book it is said tenant in Dower, as well as tenant by the Curtesy, "cannot be seised to uses [trusts] because they come to those estates by the disposition of law, for the advancement and encouragement of matrimony; and those estates are given them for their own maintenance, and are consequently exclusive of all other uses for the advantage of other people."(*g*)

The writer apprehends the correct mode of stating the point was that adopted by Brooke, J. in a case stated in his abridgment,(*h*) where he observed that the feme of a feoffee to uses [before the statute] who was endowed at the common law, should be seised to her own use, in opposition to a feme endowed *ex assensu patris* or *ad ostium ecclesiæ;* for the latter were in by the feoffee, while the former was in in the *per*, by the baron, and *yet by the law, and *without [*103] *the act of the baron*. It was well observed also by Serjeant Nudigate in the same case, that the estate of tenant in Dower is made by the law, notwithstanding that she is adjudged in by the baron, for yet this is by the law, and whether the baron will or not.

In the case of Nash v. Preston(*i*) (6 Car. I.) a person seised in fee, by indenture enrolled, bargained and sold to another in fee, in consideration of 120*l.* paid, and that the bargainee was to re-demise it to him and his wife for their lives, and with a condition that if he paid the 120*l.* at the end of twenty years the bargain and sale should be void. The bargainee redeemed the land accordingly, and upon his death, his wife brought Dower against the bargainor. Upon a bill in equity to restrain her from proceeding, it was referred to Croke and Jones, justices, to consider whether the Dower should be relieved against: "And although they conceived it to be against equity, and the agreement of the husband, at the time of the purchase, that she [the widow] should have it against the lessees, for it was intended they should have it re-demised immediately unto them as soon as they parted with it, and it was but in the nature of a mortgage, and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have Dower, and if a husband takes a fine *sur cognisance de droit come ceo* and renders arrear, although it

(*d*) Cro. Car. 190. Hard. 466. Arg. Ca. t. Hardw. 400.
(*e*) Gilb. Uses, 11, 172. 7 Co. 73, and see Hard. 469, per Hale, C. B.
(*f*) Gilb. Uses, 11. (*g*) Ib. 171. See also Bro. Feoff. al Uses, pl. 40.
(*h*) Bro. Feoff. al Uses, pl. 10. (*i*) Cro. Car. 190.

[*104] was once the husband's, yet his wife shall not have Dower, for it is in him and out of him *quasi* **uno flatu*, and by one and the same act; yet in this case they conceived that by the law she was to have Dower, for by the bargain and sale the land was vested in the husband, and thereby his wife entitled to have Dower; and when he re-demised it upon the former agreement, yet the lessees were to receive it subject to this title of Dower; and it was his folly that he did not conjoin another with the bargainee, as it was the ancient course in mortgages. And when she was dowable by act or rule in law, a court of equity should not bar her to claim her dower, for it is against the rule of law *Where no fraud or covin is a court of equity will not relieve.*" And upon conference with the other justices, who were of the same opinion, Croke and Jones certified to the Court of Chancery that the widow of the bargainee was to have Dower, and that a court of equity ought not to preclude her thereof.

The reasoning of this case is not particularly satisfactory. There could be no question but that the wife was dowable at law, but unless upon the ground which they passed over unnoticed, that a dowress is *not affected by trusts*, no reason appears why a court of equity should not restrain her. As to jurisdiction, a court of equity is as much concerned with cases of trust as with cases of fraud.

It is however said that this case of Nash v. Preston was cited in Chancery, 11 July, 1688, before Jefferies, chancellor, in a case between the creditors of the Earl of Pembroke and his heir, and by his lordship, [*105] and Lutwyche and Powell, justices, assisting, and by the bar, unanimously declared to be *against equity, and the constant course of Chancery.(*k*)

So in Noel v. Jevon(*l*) (1678,) on a bill brought to be relieved against the defendant's Dower, it appearing to the Court that the husband was but a trustee, the relief was granted; as the reporter adds, "contrary to the opinion of Nash v. Preston; and so it was said is the canstant practice of the Court now." And in Bevant v. Pope(*m*) (1681) a copyhold was granted to A. in trust for B., and A. died, leaving a widow, who by the custom of the manor was entitled to her widow's estate. The question was, whether or no she should have her widow's estate, and *not be liable to the trust.* And it was held that she should not, no more than the wife of a trustee shall have Dower, for the widow's estate springs out of the trust estate by the custom, as Dower doth by the common law.

In the modern case of Hinton v. Hinton(*n*) it was also said by Lord Hardwicke, that if the husband was seised merely as a trustee, the wife would be entitled to Dower at law, but the Court of Chancery would not suffer her to take advantage of it, because it would be taking part of that estate the whole of which was in another, and against conscience.

[*106] *The explanation of the obvious inconsistency between the modern cases, and the doctrine of Justice Brooke and Serjeant Nudigate, and of the judges in Nash v. Preston, appears to be that the substantial equity of the case has got the better of technical accuracy and consistency.

(*k*) Bacon's Tracts, 37. (*l*) 2 Freem. 43. See also 2 Ves. S. 632, admitted.
(*m*) 2 Freem. 71, and see 2 Ves. S. 633, acc.
(*n*) 2 Ves. S. 634. See also 1 Burr. 117, that the wife of a feoffee to be tenant to the præcipe is not dowable: [that is, in equity.]

Little doubt seems to be entertained in practice, that, at this day, the Court would give costs against the wife of a trustee prosecuting her Dower, both at law in equity. On this account a fine is never required in practice, on a conveyance by a trustee, or mortgagee, who happens to be married.

So where a man contracts for sale of his land, and afterwards, before conveyance made, marries, as he is a trustee in equity for the purchaser, it would seem that no fine is necessary to complete the title. The point was in effect decided in Hinton v. Hinton,(*o*) on a case of freebench, but the circumstances of which brought it to a level with the case now put concerning Dower.

If lands of inheritance are purchased with *partnership* property, and conveyed to one partner only, *primâ facie* he is a trustee for the partnership, and upon a dissolution, the lands would be distributable among the partners as partnership property;(*p*) but as the partner in whose name the conveyance was taken has the legal estate coupled with the beneficial *ownership in his own share, and as partners are tenants in common in equity of real estates purchased for the purposes of trade, it is apprehended that his wife is entitled to Dower of this share. But if there is an agreement that on the dissolution of the partnership, the lands shall be valued and sold, it was the opinion of Lord Thurlow, that the lands must be considered as personal estate, and distributable as such.(*q*) [*107]

The implied trust for the partnership may, however, be rebutted by evidence that the agreement for the purchase of the lands was specific, namely, that they should be the separate property of the partner to whom they were conveyed, and that he should be a debtor to the partnership for the sum paid for the purchase. Upon an agreement of this nature, it was observed by Lord Loughborough that the lands could never be specifically divided, as if they were part of the partnership stock, but when they come to settle, these lands are one partner's, and he is a debtor for so much money. In this case, therefore, his lordship determined that the wife was dowable of the whole.(*r*)

As a qualification to these observations it should be remarked, that if a court of equity sees reason to believe that the person alleged to be a trustee was in point of fact the *bonâ fide* owner of the estate, and that the declaration of trust which is produced *was nothing more than a fraudulent contrivance to defeat creditors, or others, it will not permit this trust to be set up as a bar to Dower against the wife of such *bonâ fide* owner. This at least seems to be the proposition to be gathered from Bateman v. Bateman.(*s*) In that case a father purchased land in the name of his eldest son, who was put in possession, and afterwards falling sick, was procured to execute a declaration of trust for his father, but afterwards recovering, continued in possession and married, and dying without issue, his brother and heir conveyed to the father. The widow of the eldest son having brought a writ of Dower, the father filed his bill in Chancery to be relieved against it, and [*108]

(*o*) 2 Ves. S. 631, 638. Ambl. 277, recognised in Browne v. Raindle, 3 Ves. 256, which see.

(*p*) See Smith v. Smith, 5 Ves. 189.

(*q*) Thornton v. Dixon, 3 Bro. C. C. 199.

(*r*) Smith v. Smith, 5 Ves. 189.

(*s*) 2 Vern. 436.

obtained a decree at the Rolls; but upon appeal Lord Keeper Wright dismissed the bill, declaring it to be a secret and fraudulent deed of trust to deceive creditors and purchasers, and the widow was declared to be at liberty to prosecute her writ of Dower. The Lord Keeper must consequently have been of opinion that the purchase by the father was intended as an advancement for the son, and that his name was not used as a trustee for the father, and that under the circumstances, the subsequent declaration of trust *did not prove the contrary, or raise any trust in the father's favour*, but was merely a contrivance for purposes of fraud, having no operation even between the parties. It is not enough that the declaration of trust, as voluntary, was fraudulent against creditors under the statute-law; *if good as against the party, it was [*109] clearly an equitable bar to Dower, as executed before marriage. The doctrine of the Lord Keeper must therefore have gone further, and was probably founded on the continuing possession of the son after his recovery.

[*110] *CHAPTER VII.

Of what PROPERTY *whereof the husband is seised the wife shall be* ENDOWED, *in respect to the* NATURE AND QUALITIES *thereof.*

ASSUMING the circumstances of *marriage* and *seisin* to have concurred to give a woman a title of Dower, it remains to inquire on what kind of property of which the husband is seised that title will attach.

The words of Littleton(*a*) are, "Tenant in Dower is where a man is seised of certain *lands* or *tenements*." The signification of the word "lands" is well known:(*b*) but, the extent of the word "tenements" has frequently been made the subject of discussion, in consequence of its being the only word contained in the statute De Donis. From the commentary of Lord Coke upon the 14th sect. of Littleton,(*c*) it appears, that to constitute a *tenement*, it is not necessary that the thing itself lie in tenure; it is sufficient if it is issuing out of, or concerning, or annexed to, or exerciseable with, corporeal inheritances which may be *holden*. The word *hereditaments* *is properly omitted by Littleton, [*111] for there may be hereditaments which do not in any degree savour of the realty, although descendible from ancestor to heir, and of such hereditaments as these a woman is not dowable. An annuity in fee that charges only the person, and does not issue out of any lands or tenements, is an instance of this.(*d*) And although it were originally granted as a rent charge, yet if the grantee, by bringing a writ of annuity, elects to take it as a personal annuity, his wife will not be dowable.(*e*) But if, before any election by the husband, he dies, and his wife brings a writ of Dower against the heir, he cannot say in bar of her Dower

(*a*) Sect. 36.

(*b*) And see Co. Litt. 4. *a*. In Stoughton v. Leigh, Sir James Mansfield remarks on this passage, that Lord Coke says not a word to explain what is land, or what is a tenement, thinking the import of those terms well known in law. 1 Taunt. 409.

(*c*) Co. Litt. 20. *a*.; and see 2 Ves. J. 663.

(*d*) Perk. sec. 347; Co. Litt. 32. *a*.

(*e*) Perk. sec. 273.

that he claims the same as an annuity, and not as a rent charge, for he cannot determine his election by claim, but by suing a writ of annuity.(*f*)

But of all real hereditaments, unless there is some special reason to the contrary, a woman is dowable, whether corporeal or incorporeal; as of—

A Manor;(*g*)

An Advowson in gross, or appendant;(*h*)

Tithes, Pensions, or other ecclesiastical profits, which came to the crown by the statutes of 27 Hen. VIII. 31 Hen. VIII. and 1 Ed. VI.(*i*)

A Rent Service; (*k*)

*Rent-charge;(*l*) [*112]

Rent-seck; (*m*)

A common certain, in gross, or appendant;(*n*)

Of franchises, parcel of an honour;(*o*)

Of all tenures which she is capable of;(*p*)

So, of all liberties and profits savouring of the realty,(*q*) wherein the husband is seised of an estate of inheritance; as,

A Piscary;(*r*)

Offices,(*s*)

As the office of a bailiff, or parker;(*t*)

The office of the marshalsea of the King's Bench;(*u*)

*The custody of the gaol of Westminster abbey;(*v*) [*113]

A fair;(*w*)

A market;(*x*)

A dove-house;(*y*)

Courts, fines, heriots, &c.(*z*)

A mill;(*a*)

(*f*) Co. Litt. 144. *b.* (*g*) Bragg's case, Godb. 135; Gouldsb. 37; Cro. 4.

(*h*) F. N. B. 148, 150 (cites 1 E. 1. Dow. 176;) Cro. Jac. 621; Co. Litt. 32. *a.*; Perk. sec. 342, 343.

(*i*) Co. Litt. 159. *a.* 32. *a.*; Sty. 99. (*k*) Perk. sec. 345.

(*l*) Perk. sec. 347. (*m*) Co. Litt. 32. *a.* Perk. sec. 347

(*n*) Perk. sec. 342. F. N. B. 148; Thel. Dig. 67. l. 8. c. 5. sec. 15 (cites T. 4 E. 3. 146,) but in dower of common certain, demandant shall not be endowed unless she show the certainty. Godb. 21.

(*o*) Howard v. Cavendish, Cro. Jac. 622.

(*p*) Style's Pr. Reg. 69. (*q*) F. N. B. 18, 148.

(*r*) Co. Litt. 32. *a.* (cites Bract. 98. 208; Brit. 247; Flet. l. 5. c. 23; 17 E. 2; Dow. 104, 163.)

(*s*) Style's Pr. Reg. 122; Thel. Dig. 67. l. 8. c. 5. sec. 3. (cites 12 E. 3. Dow. 90,) F. N. B. 18, 149.

(*t*) 12 E. 3. Dow. 90; Co. Litt. 32. *a.*; F. N. B. 8. (K) marg.; Perk. sec. 342; Gilb. Dow. 371. The author of The Woman's Lawyer observes, "an ancient keepership of a park with a fee belonging to it, may be appointed or assigned in Dower; but so is not a keepership newly granted, and *sans* fee, which is a charge without gain or utility." p. 189.

(*u*) 21 E. 3. 57; Co. Litt. 32. *a.*; F. N. B. 8. (K) marg. In Hughes on Writs, p. 192, it is said, "note that in every bailiwick or office in which the husband hath a fee, which bailiwick or office the wife may by herself or others sufficiently keep, she shall have dower of it, but of the office of Steward or Marshal of England, which she cannot execute by herself, she shall not be endowed."

(*v*) Co. Litt. 32. *a.*; Theloal. Dig. 67. lib. viii. cap. v. sec. 2.

(*w*) 15 E. 3. Dow. 81; Co. Litt. 32. *a.*; F. N. B. 8 (K) n.; Bro. Ass. pl. 471; Fitzh. Sci. Fa. 122; Gilb. Uses, 371.

(*x*) H. 12 E. 2. Dow. 157; Gilb. Uses, 371; F. N. B. 8 (K) n.

(*y*) Co. Litt. 32. *a.* (*z*) Ibid.

(*a*) Perk. sec. 342; Gilb. Uses, 371; F. N. B. 8 (K) *a.*

It is said by Perkins, that "if a man grant unto me and my heirs to take yearly out of his meadow three loads of hay, and I take a wife and die, my wife shall have Dower thereof."(*b*) But "if a man grant unto me and my heirs to take yearly so many estovers in his wood in Dale, as I and my heirs will burn in the same manor of Dale, and I have a wife and die, my wife shall not have Dower of the estovers."(*c*)

Upon the construction of some of the inland navigation acts, it has been decided that shares in those navigations are real estate, and subject to the incidents of real estate. So also it is held with regard to New River shares.(*d*) But generally speaking, *acts of this nature negative, by express words, the quality of real estate, as applicable to the shares. In Buckeridge v. Ingram,(*e*) it was made a question upon the Avon Navigation Act,(*f*) whether, if the shares were real property, a widow was entitled to Dower out of them. Lord Alvanley was clearly of opinion upon the language of that act, that the shares were not only real estate, but that they were *tenements* of which a woman is dowable; and he referred to the old authorities as to a mill, a fair, a piscary, &c. observing, "there can be nothing more like the present subject than the latter, which, without connexion with the soil, is the right of fishing; and if Dower can attach upon that, it is strange if this is not equally real estate."(*g*)

[*114]

It has already been propounded, that a woman is dowable of an advowson appendant, of a common appendant, and of other things which usually lie in appendancy. It should however be understood as meaning nothing more than that she is dowable of such things as are appendant by reason of her right to be endowed of the manor, &c. to which they are appendant, and not as things to which she can make a substantive claim of Dower, for that would be to sever the appendancy. And this qualification is *material to be borne in mind, since many things which are usually appendant, as franchises, &c. are considered in their own nature indivisible, and that consequently a woman cannot be endowed of them unless she is endowed of the entirety of the thing to which they are appendant. Thus, a woman endowed of the third part of a manor to which franchises are appendant, shall not have the third part of the franchises, but, if she is endowed of the entire manor, in allowance of her Dower in all the lands, &c. of the husband, she shall have the franchises as appendant to the manor.(*h*) This subject will be further pursued in the chapter treating on assignment of Dower.

[*115]

It is laid down by Bracton, that a woman cannot claim a thing in Dower, unless she may use and enjoy the thing of which she is dowable *sine vasto, exilio, et destructione.*(*i*) In Thynn v. Thynn,(*k*) in error

(*b*) Perk. sec. 343 (cites M. 11 E. 3. 85 ; M. 15 E. 81; T. 4 E. 3. 32.)
(*c*) Perk. sec. 341.
(*d*) See Drybutter v. Bartholomew, 2 P. W. 127; Swayne v. Fawkener, Show. P. C. 207; and see 2 Ves. S. 182.
(*e*) 2 Ves. J. 652. (*f*) 10 Ann. Priv.
(*g*) 2 Ves. J. 664. Under the act in question, the undertakers were empowered to make cuts and erections, and to receive certain tolls, payable by all persons and goods navigating that part of the river, thereby giving them, as Lord Alvanley remarked, "a right in and over the soil, and certain real rights arising in and out of the soil. Ib. 663.
(*h*) Hughes on Writs, 192 (cites 3 E. 3. Ita Derby, Dow. 103.)
(*i*) Hughes on Writs, 191 (cites Bract. 316. p. 1, 2.) (*k*) Sty. 68.

on a writ of Dower, it was objected among other things, that Dower was demanded of a thing not dowable, viz. of a quarry of stones, which would be to the destruction of the inheritance; and that indeed it was impossible, for a quarry of stones could not be divided by metes and bounds, which must be, if she could endowed of it. And also if the mine and quarry should be divided, the tenant of the land would be prejudiced; and that a quarry could not be divided, they cited Co. Litt. 164. On the other side it was replied, that a feme is dowable *of a quarry, and that it might be divided by metes and [*116] bounds, for it might be divided by the profits, although it could not be divided by the quantity of the thing.(*l*) No judgment appears to have been given on this point. In the late case of Stoughton v. Leigh,(*m*) it became necessary to decide upon the rights of a dowress as to property of this nature. In that case, the husband was the owner of several mines and strata of lead and coal, some of them in lands of which he was himself seised in fee, and others in the lands of other persons, and which had been granted to him in fee simple.(*n*) Some of these mines and strata had been opened and wrought, and others not. On a case sent to the court of Common Pleas, the judges of that court certified that the widow was dowable of all her husband's mines of lead and coal, as well those which were in his own landed estates, as the mines and strata of lead, or lead ore, and coal, in the lands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of *inheritance, and that her right [*117] to be endowed of them had no dependance upon the subsequent continuance or discontinuance of working them, either by the husband in his life-time, or by those claiming under him since his death.

The language of this certificate is perhaps open to some observation. It could scarcely be intended by the court that the widow was dowable of the mines in her husband's own lands as *substantive* hereditaments. Those mines were parcel of the inheritance, and her life-interest in the lands themselves, or rather in her third part of them, carried with it the legal right to the benefit of such of the mines included in that third part as were opened. That this was all the court meant to express might be gleaned from their observations upon the mode in which the assignment was to be made by the sheriff of the husband's own lands. "It was not absolutely necessary (they remarked), that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her might consist wholly of land set out by metes and bounds, and containing none of the open mines. Or he might include any of the mines themselves in the assignment to the widow, describing them specifically, if the particular lands in which they should lie should not also be assigned; but if those lands

(*l*) It is not stated in the report that the quarry was in the husband's own lands, but this may probably be gleaned to be the fact. On a former day it had been argued, that "here is a demand of such things whereof dower lies not, viz. of a quarry of stones, *and it appears not that the quarry was open in the life of her husband;* and if it were, that it is improper to demand it by the name of a quarry." To which it was replied, that "the word quarry is a good word, and well known what it means, for *quarrera* is an old well known Latin word for it; and she is as well dowable of it as of a mine of coals, and it shall be intended to be open because she demands it by the name of a quarry."

(*m*) 1 Taunt. 402.

(*n*) So at least it was taken by the court.

should be included in the assignment, the open mines within them might, but were not necessarily to be so described, *being part of the land* itself which was assigned; and as the working of open mines was
[*118] not waste, the tenant in Dower might work such mines for her own exclusive *profit. Or the sheriff might divide the enjoyment and perception of the profits of any of the particular mines as after mentioned;" i. e. by directing seperate alternate enjoyment for short periods.

These observations seem fully to admit what the writer apprehends to be without doubt the real state of the law, that the wife is dowable of opened mines in her husband's lands as parcel of the inheritance, and not as distinct or collateral inheritances. Mines in a man's own lands are clearly so far from being distinct inheritances, that they are merely *a mode of enjoyment.* The right to the soil is the right to the profits of it, subject only to such restrictions as the law has imposed upon the owners of particular estates with respect to the mode of enjoying those profits. On the other hand, it is difficult to understand how the admission that the sheriff might assign particular mines *not within the lands* assigned to her, is to be rendered consistent with this view of the law. If the wife is entitled to the benefit of mines in her husband's lands, merely in respect of her interest in the particular lands under which they lie, how can that benefit be extended to mines under other lands of her husband to which she is a stranger? As well might it be said that the sheriff might endow her of a clump of trees in lands which are not included in the assignment of her Dower. If she is endowed of the land itself upon which the trees grow, she has that interest in the trees which the law allows to a tenant for life, but if the land is not assigned to her, she cannot be snbstantively endowed of the trees. The mines
[*119] being equally parcel of the inheritance as the *trees, are in the same predicament. These considerations will probably account for the circumstance which struck the court with some surprise that no mention was made of mines by Lord Coke in enumerating the species of inheritance of which a woman shall be endowed.

It may also be remarked, that if the mines were to be considered in any other light than as parcel of the inheritance, the certificate would appear to be wrong in saying; that "it was not of actual necessity that the sheriff should assign to her any of the open mines themselves, or any portions of them;" for the law seems to be that the sheriff is bound to assign a third part (either in possession or in profit,) of each species of property of which the wife is dowable.(*o*)

With regard to the mines and strata under the lands of other persons, the subject might perhaps have merited further consideration. Assuming the law to be that an interest of that nature though in itself perishable, is yet capable of being granted in fee, it may be made a question, if a woman is dowable in any case of such property, how the circumstance of the mines being opened or unopened can make any difference; the analogy wholly failing between such property, and mines in the lands of her husband, which are parcel of the inheritance. In the latter case, her right to work *opened* mines arises as a mode of enjoyment, to which, in respect of her interest in the lands, she is entitled; while the

(*o*) See the chapter on assignment of dower, infra.

denial of her right to open the mines not wrought by her husband, arises solely from the restricted *nature of her interest in the lands. On this point, the law was well stated by Lens, Serjeant, in argument on this case. "Where mines have been actually wrought as part of the estate of the husband, they may be collaterally subject to Dower with the rest of his real property. But mines have never been assigned as in their own nature liable to Dower. The interest of tenant in Dower is a life estate only; but an interest which can enable the possessor to open mines must be an estate of inheritance, for it is an act of waste in a tenant for life."(*p*) [*120]

This doctrine is wholly inapplicable to the case of grants of strata in the lands of a third person to the husband in fee. In that case, working the mine is the only mode of enjoyment of which the property is capable, and if such a property were granted to A. for life, remainder to B. in fee, it would be difficult to understand how B. could maintain waste against A. for opening the mine, when it is obvious that A. is to have some interest, and the denying his right to open the mine, is in effect denying that that interest is to confer any species of enjoyment. If mines are unopened in a man's own lands, nothing short of an ownership of the inheritance will enable him to open and work those mines; but, if he grants the mines substantively to another, it would be a new doctrine to contend that he must grant an estate of inheritance, in order to confer a right of taking the benefit of the grant.

The exceptions to the rule, that the wife is dowable of the lands or tenements of her husband, have *arisen principally upon feudal principles, and regard those hereditaments whereof the husband is in some sort a trustee for the public, or wherein the public have an interest. Thus the Queen consort shall not be endowed of the crown;(*q*) nor shall a woman be endowed of a castle or fortress that is maintained for the defence of the realm; "because (says Coke,) it ought not to be divided; and the public shall be preferred before the private."(*r*) For the same reason it was the law before the abolition of military tenures, that a woman should not be endowed *de homagiis* of her husband *quæ sunt de guerra.*(*s*) [*121]

But of a castle that is only maintained for the private use and habitation of the owner, a woman is dowable.(*t*)

Of the capital messuage or mansion, being *caput baroniæ*, or *comitatus*,(*u*) the wife shall not be endowed, for the honour of the realm. But the application of this doctrine has been almost entirely removed from modern practice by the decision in Gerrard v. Gerrard,(*v*) which restrained it to baronies by tenure. In this case, Lady Gerrard brought a writ of Dower, and therein demanded a third part of a capital messuage called Bromley Hall. The *tenant pleaded that the messuage in demand had time out of mind been called as well [*122]

(*p*) 1 Taunt. 406. (*q*) Liber Successionis. 92. *b.*

(*r*) Co. Litt. 31. *b.*; Bract. 93. *a.*; 2 Inst. 17.

(*s*) Pat. 1 E. 1. M. 17; and see Esch. 4. E. 1. nu. 88.

(*t*) P. 23 El. C. B.; Co. Litt. 31. *b.*; Bract. f. 96; Brit. cap. 103; Flet. l. 5. c. 23; 30 E. 1. Vouch. 298; 17 H. 3. Dow. 192; 8 H. 3. Dow. 196; 8 H. 3. ib. 194. See further on this head in the chapter on assignment of dower.

(*u*) Co. Litt. 316; 4 H. 3, dower, 180.

(*v*) 1 Raym. 72; 5 Mod. 64; 1 Salk. 253; 3 Lev. 401; Holt. 260; Comb. 352; Skin. 593; Cases B. R. 84.

Gerard's Bromley, as Bromley Hall; and that Sir Thomas Gerrard being seised thereof in his demesne as of fee, King James I. by letters patent under the great seal of England, created the said Sir Thomas Gerrard Baron of Gerard's Bromley, and that he was commorant there with his family, and so the messuage in demand became, and had ever since continued, *caput baroniæ*, and brought down the title both of the barony and messuage to himself, demanding judgment if the demandant ought to be endowed thereof. The Court of Common Pleas, upon demurrer by the demandant, gave judgment for her; upon which, the tenant brought error in the Court of King's Bench, and assigned in part, that the demandant ought not to be endowed of this messuage, being *caput baroniæ*, because it would tend to the dishonour of the dignity to have the capital messuage divided and dismembered; but, it was for the honour of the realm that it be kept entire, and for authorities were cited 1 Inst. 31. *b.*; Fitz. Abr. Dower. 180; Bract. lib. ii. 170. *b.*; P. 4. H. III. Rot. 7. For the defendant in error it was argued, that the authorities cited of the other side were of feudal baronies, of which there were not any remaining at that time except Arundel. And of this opinion was the whole court. And this privilege was allowed to them, because they ought, upon necessity, to defend the realm to which they were bound by tenure. For the King, at the creation of the barony, gave to the baron lands and rents, to hold of him by the defence of the realm.

[*123] But then this cannot be a feudal barony, *for it was in the seisin of the Gerrards before, and therefore was not given to the Gerrards by the King at the creation of the barony, to hold of him. And Rokeby, Justice, said, that this was the reason of the judgment in the Common Pleas.

Of some tenures a woman is not dowable by reason of her incapacity.(*w*)

If A. holds land of B. by homage, fealty, and 10*s.* rent, and B. dies, his wife shall not be endowed of the homage and fealty, but shall have a third part of the rent as a rent-seck.(*x*)

And there are some things whereof it is said a woman shall not be endowed, because they are so entire in their own nature, that they cannot be divided: as of a hundred.(*y*)

Neither shall a woman be endowed of a common sans number, for otherwise, say the books, the common would be overstocked.(*z*) In a case reported by Godbolt, Windham, J., said, that if the common be uncertain, she shall be allowed for it; but Meade, J., said, he did not know how the allowance should be made.(*a*)

So far as Dower is a legal right, and is to be pursued by legal remedies, it is obvious, that the estates in respect of which it is claimed, can be such only as have existence in the contemplation of a court of law.

[*124] It never could become a question, therefore, *whether the wife of a *cestui que trust* could have a title of Dower at law. But a question which has been the subject of much agitation, and upon which, though now settled, the rule was for a long time in a vacillating

(*w*) Styles. 69.
(*y*) Styles. Pr. Reg. 68.
(*a*) Anon. Godb. 21.
(*x*) Kelw. 126; Perk. sec. 345, 346.
(*z*) Perk. sec. 341 (cites 2 E. 2. 123) Godb. 21.

state,(*b*) was whether courts of *equity, having in most cases [*125]
applied the rules and incidents of legal estates to the ownership of the trust, should or should not follow that principle in relation to Dower, and give the wife of a *cestui que trust* an equitable equivalent for her Dower at law, out of the trust estate.

Before the statute of uses, the courts of equity, although in many cases they made the estate of the *cestui que use* subject to the incidents of legal estates, yet, for some reasons which can now only be conjectured, did not think fit to give Dower of an use.(*c*) Perhaps the courts, considering such interests only as arose by *contract* the proper subjects of their jurisdiction, looked upon Dower as a right arising solely by implication of law, and therefore not within the pale of equitable cognizance. Chief Baron Gilbert states as a reason, that the chancery would not allow the feoffors to be seised to any body's use but those that were particularly named in the trust;(*d*) and this does not seem altogether improbable, looking at the use, as courts of equity did then look at it, as the creation of the parties, and therefore to be solely governed by their expressed intent. However this may be, when, in consequence of the construction which had been put upon the statute of uses, chancery trusts had been introduced in practice, conveyancers, regarding them as equivalent to uses before the statute, and governed by the same rules, adopted the plan of putting the legal estate in trustees, in cases where it was an object to avoid the attachment of a title of Dower, and the *efficacy of this mode was so little doubted [*126]
of, that it became a very general practice. Here arose the difficulty; for, in the mean time, the doctrine of trusts had become the subject of progressive consideration in courts of equity, and they had by degrees formed a system of equitable jurisdiction, with regard to the estate in the trust, in which they had been chiefly governed by analogy to the rules of law, and under which (the same objection not occurring,)

(*b*) In Colt v. Colt (12 Car. 2.) 1 Ch. Rep. 254. 2 P. W. 640, cited; the plaintiff filed her bill, among other things, for dower of a trust estate. and the bill was dismissed, so far as related to the trust estate.

In Fletcher v. Robinson (1653,) Pr. Ch. 250, cited; 2 P. W. 710, cited from L. R., dower was decreed out of a trust estate, and that the conveyance of the legal estate should not be given in evidence at law; and the deed being set up at law notwithstanding, and the plaintiff consequently nonsuited, the court afterwards ordered a commission to set out the dower.

In Radnor v. Rotheram (1696,) Pr. Ch. 65, it was said by Lord Chancellor Somers, that all agreed that a woman cannot be endowed of the *trust* of the inheritance, as she may of the inheritance itself.

In Bottomley v. Fairfax (1712,) Pr. Ch. 336; 1 Ch. Rep. 254, it was clearly agreed, that if the husband before marriage conveys his estate to trustees and their heirs, in such manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this equitable estate the wife shall not be endowed, and that the court had never gone so far as to allow her dower in such a case.

In Daly v. Lynch (1715,) 1 Bro. P. C. 538, it was said, that there were several precedents in Ireland, where the widows of transplanters, who, in satisfaction of their old estates, had lands given to them under the government of Oliver Cromwell, by transplantation, and consequently had but equitable estates, had obtained decrees in the Court of Chancery in that kingdom, for the third part of such equitable estates and transplanted interests.

In Ambrose v. Ambrose (1717,) 1 P. W. 321; Printed cases in D. P. 1717, it was considered clear, that a woman was not dowable of an estate bought by her husband in the name of a third person.

The subsequent cases are mentioned in the text.

(*c*) 4 Co. 1. *b.*; Perk. sec. 349; 1 Co. 123; Dy. 11. pl. 47; 3 P. W. 233.

(*d*) Gilb. Uses, 25.

they had made the trust subject to *curtesy*.(*e*) Upon an attentive perusal of the cases, it will be found, that after much hesitation, whether to prefer consistency of principle, or security of titles, the latter motive at length gained the ascendancy, the existence of an anomalous distinction being regarded as of less importance than the extensive mischief which would have been produced by disregarding a practice which had been applied to perhaps half the titles in the kingdom. Some judges have indeed endeavoured to vindicate, upon principle, the rule which denies Dower of a trust, but the consideration above stated has been the substantial and predominating ground upon which that rule is now decisively established without danger of further discussion.

This was well stated by Lord Redesdale in D'Arcy v. Blake.(*f*)

[*127] "The difficulty (he observed,) in which *the courts of equity have been involved with respect to Dower, I apprehend originally arose thus: they had assumed as a principle in acting upon trusts, to follow the law; and according to this principle, they ought in all cases where rights attached on legal estates, to have attached the same rights upon trusts; and consequently to have given Dower of an equitable estate. It was found, however, that, in cases of Dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of Dower upon a contrary principle; and had supposed that, by the creation of a trust, the right of Dower would be prevented from attaching.(*g*) Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of Dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the

[*128] curtesy, without the concurrence of *the person in whom that right was vested. This I take to be the true reason of the distinction between Dower, and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of Dower, but it was not necessary in the case of tenancy by the curtesy."(*h*)

In the case of Banks v. Sutton(*i*) (1732,) Sir Joseph Jekyll was

(*e*) See the cases of Watts v. Ball, 1 P. W. 108. 2 Eq. Ab. 727; Sweetapple v. Bindon, 2 Vern. 536; Casborne v. Scarfe, 1 Atk. 603. 2 Eq. Ab. 728; Cunningham v. Moody, 1 Ves. 174; Dodson v. Hay, 4 Bro. C. C. 404; Roberts v. Dixwell, 1 Atk. 609; Hearle v. Greenbank, 1 Ves. 299. 3 Atk. 716, for authorities on this head.

(*f*) 2 Sch. and Lefr. 388; and see also 1 Bl. 160, 182.

(*g*) Lord Chancellor Talbot, in Attorney General v. Lockley, Sugden's Vend. Appendix. 32, speaking of the practice, says, "I mention this, because it is hinted at as if the practice of conveyancers was not of great weight; and truly it is not in their power to alter the law: but when there is a received opinion, and conformity of contracts and settlements thereupon, it is extremely dangerous to shake it, which would disturb the possession of many who are very quiet, and think themselves very secure; therefore, it ought to be done only on the clearest and plainest ground. In the present case, I cannot say they are mistaken; because they have gone on this ground, that trusts are now what uses were at the common law, where a wife was not dowable of an use."

(*h*) Under this view of the subject, it is difficult to understand why the denial of dower of trust estates has been extended to freebench in copyholds, unless for the sake of analogy to the anomalous case of dower. See Forder v. Wade, 4 Bro. C. C. 525.

(*i*) 2 P. W. 700.

strongly inclined to take a distinction, (though he decided the case on another ground,) between a trust created by the husband himself, of which he admitted a woman was not dowable, and a trust created by *another person*. "That the wife shall not have Dower of a trust created by the husband," he remarked "or (which is all one,) of a purchase made by him in a trustee's name, may be reasonable, since it may be presumed to be done with intent to bar Dower, and every man may do as he pleases with his own. Accordingly, it has been commonly practised for a purchaser to take a conveyance in his own name and in the name of another person, as trustee, purposely to prevent Dower." He then proceeds to cite the cases of Robinson v. Fletcher,(*k*) Otway v. Hudson,(*l*) &c. and after observing upon them, he added, "after all these reasons and authorities, *I must declare, that I would not take it upon myself to determine whether a wife shall have Dower out of a trust of inheritance, where it is created, not by the husband, but by some other person, and no time limited for conveying the legal estate; when that comes to be the case, it will be time enough to do it." In Chaplin v. Chaplin,(*m*) which was decided soon after, one of the questions was, whether the plaintiff was dowable of an equitable rent charge created by a settlement to which the husband was no party; and after much debate and consideration, Lord Chancellor Talbot was of opinion, that the cases cited did not bear out the general proposition that there shall be Dower of a trust. In Attorney General v. Scott (1735,)(*n*) Lord Chancellor Talbot made the same decision upon an equitable estate taken by the husband by devise. The distinction contended for by Sir Joseph Jekyll does not seem to have been mentioned in argument in either of these cases, although both of them involved it. In Godwin v. Winsmore,(*o*) however, Lord Hardwicke expresssly adverted to the point. "It is an established doctrine, now," he observed, "that a wife is not dowable of a trust estate. Indeed, a distinction is taken by Sir Joseph Jekyll in Banks v. Sutton, 1 P. W. 707, 709, in regard to a trust, where it descends or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction; for, it is going on suppositions which hold on both sides; *and, at the latter end of the report, Sir Joseph Jekyll seems to be very diffident of it himself, and rested chiefly on another point of equity, so that it is no authority in this case. But (he added,) there is a late authority in direct contradiction to the distinction above taken in Banks v. Sutton, the case of the Attorney General v. Scott," &c. So also, in Burgess v. Wheate, Sir Thomas Clarke remarked that the distinction made by Sir Joseph Jekyll was founded on too precarious reasoning to go upon. "The husband," he added, "*found* the estate subject to the trust created by the ancestor: who can say that he intended the wife to be dowable? Who can say, that if he had not found the estate under a trust, he might not have created such a trust?"(*p*)

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In the state of the law in modern times, as to equitable estates, it does

(*k*) Supra, p. 124. note. (*l*) 2 Vern. 583.
(*m*) 3 P. W. 229.
(*n*) Ca. t. Talbot. 138; and more fully, Sugd. Vend. Appendix. 32.
(*o*) 2 Atk. 525. (*p*) 1 Bl. 138; and see Ib. 161.

not admit of a doubt that the rule as now settled, denying Dower out of a trust, is a departure from principle; but in considering this question from time to time, some of our equity judges appear to have unnecessarily imposed on themselves another difficulty, and to have argued the case upon a ground which is very questionable. Much of the embarrassment which has occurred in deciding how far the right to Dower should prevail, as a matter of substantive jurisdiction, in courts of equity, particularly in applying it to trusts and equities of redemption, has arisen from the notion that Dower is not merely a legal, but also an equitable right. To make out that it was a right of that description, and to bring it within the grounds of original equitable jurisdiction, it [*131] was necessary that it *should originate in contract, either express or implied; and several judges have gone the length of arguing upon it accordingly. The bulk of the argument of Sir Joseph Jekyll in Banks v. Sutton,(*q*) is directed to prove, that Dower is a moral and equitable, as well as a legal right. "The relation of the wife," he observes, "as it is the nearest, so it is the earliest; and therefore the wife is the proper object of the care and kindness of her husband; the husband is bound by the law of God and man to provide for her during his life, and after his death, the moral obligation is not at an end, but he ought to take care of her provision during her own life." All this is perfectly true, but nothing to the purpose. That the wife has a *moral* right to a provision, is a consideration of legislative, and not of judicial application; courts of equity do not sit to enforce naked moral obligations; neither does the moral obligation of a husband to provide for his wife dictate any such specific and defined provision as that entitled Dower. The result of the mere moral obligation is equally undefined as that of a parent to provide for his children. That the law has followed up this obligation, in the case of the wife, with an arbitrary imperative provision, is nothing to the purpose, but leaves it merely to the original question (a question upon which it is true that convenience has got the better of principle) whether in this instance equity should follow the law. "But," adds Sir J. Jekyll, "Dower arises from a contract made upon a valuable [*132] consideration; marriage being in its nature a *civil, and in its celebration a sacred contract, and the obligation is a consideration moving from each of the contracting parties to the other; from this obligation arises an equity to the wife, in several cases, without any previous agreement, as to make good a defective execution of a power, or defective conveyance; or supply the defect of a surrender of a copyhold estate; in all which equity relieves the wife, and makes a provision for her, where it is not unreasonable or injurious with respect to others."(*r*) This argument confounds the contract itself with the extraneous legal fruits of the contract. It is the very absence of contract for the provision of the wife, which calls into operation the positive law to counteract the injustice which might arise from the omission of such contract. Strictly speaking, the engagement between the parties is nothing more than a contract to enter into the respective relations of matrimonial union, and the law, contemplating the consequences of

(*q*) 2 Eq. Ab. 382. n. 2 P. W. 634; and see also Pr. Ch. 244, per Sir John Trevor, in Dudley v. Dudley.

(*r*) 2 Eq. Ab. 382 n.

that contract, by its own silent operation raises a provision for the wife in the event of her surviving, independent of, and without reference to the agreement of the parties. It may, indeed, be said, that allowing the right to Dower does not enter into the essence of the original contract, yet, the general understanding that the wife should be so provided for by force of the marriage ordinance, does in fact form a basis of the contract, and as such a matter of equitable support. But, even this argument fails to bear out the position; for, as was ingeniously remarked by Lord Chancellor *Talbot,(*s*) "the answer is, [*133] equity, where there is a valuable consideration, will supply form. But hath she contracted for this particular estate? [the trust estate] No, for nothing but what the marriage implies, which is that she shall have Dower of what she is dowable by law; and then the question comes to this, whether she is dowable by law of a trust." The same answer applies with equal force to another argument of Sir Joseph Jekyll's, viz. that the right of Dower is founded upon *express* contract. "By the common law (he observes) where the husband had an inheritable estate, it was part of the marriage contract that the wife should have her Dower, one species of which was *ad ostium ecclesiæ.*" Litt. sec. 39. 'When the husband comes to the church door to be married, after affiance or troth plighted between the husband and wife, he endows her,' which implies that such endowment is *before* the marriage is completely solemnized; and though Lord Coke says such Dower is *after* the marriage solemnized, this is a mistake.(*t*) Also by the Romish ritual used here before the Reformation, it appears that all marriages were celebrated *ad ostium ecclesiæ;* so that it should seem to be incumbent on the husband if he could do it, to endow his wife, and to specify the Dower upon the marriage; instead of which the general words of *endowing with all his worldly goods*, in the office of matrimony now in use, came in; from whence it is to be inferred that Dower is, and time *out of mind has been, a part of the marriage [*134] contract when it came to be publicly solemnized; and, if so, a right of Dower is founded on contract, and is therefore an equitable right."(*u*)

It is difficult to conceive any reasoning more loose than the above, but even had it been otherwise, its application to equitable estates would have been sufficiently rebutted by Lord Talbot's observation before stated. Of the passage in the marriage service of the Church of England, alluded to by the learned judge, it is perhaps difficult now to point out the real history. That service was not composed by lawyers; and the divines who inserted it probably intended nothing more than to express the moral duty of the husband to make his wife the partaker of his worldly fortune.(*v*) If the lawyers had been *consulted on the subject, and it had been proposed by them to [*135]

(*s*) Attorney General v. Lockley. Sugden's Vendors. App. 34.

(*t*) The mistake is not with Littleton, but with Sir Joseph Jekyll. See Perk. sec 437, Hughes on Original Writs, 176. 2 Bl. Com. 134, note.

(*u*) 2 P. W 638. 2 Eq. Ab. 382, n.

(*v*) In a note to 2 Bl. Com. 134, are the following observations: "When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, *quod dotat eam de tali manerio cum pertinentiis*, &c. (Bract. l. 2. c. 39. sec. 6.) and therefore in the old York ritual (Seld. Ux. Hebr. l. 2. c. 27.) there is at this part of the matrimonial service the fol-

engraft a species of Dower *ad ostium ecclesiæ* upon the formulary of the Protestant church, they would surely have suggested some other mode of expressing it than that of "with all my worldly *goods* I thee endow;" and if the effect of that expression be such as Sir Joseph Jekyll has represented it, it is difficult to say how a man can answer to his conscience in making that declaration in the face of the church, who has the day before executed a settlement for barring his wife's Dower.

These observations are of little importance at this day in application to the question of Dower out of equitable estates, which is too well settled on other grounds to be now agitated; but as it is impossible to define the influence of plausible, though fallacious, reasoning, under the sanction of great names, the writer has thought it might be not wholly without use to direct the attention of the reader to the fallibility of the argument in question.

In the case of Banks v. Sutton before referred to, Sir Joseph Jekyll decided, that where there is a time limited for conveying the legal estate, and that time expires in the life of the husband, there, without regard to the question of Dower out of trust estates, the wife shall be dowable, upon the principle in courts of equity, "that when an act is to be done by a trustee, that is to be looked upon as done which ought to be done; [*136] consequently the estate directed *to be conveyed to the plaintiff's husband ought to be considered as actually conveyed to and vested in him; and then the plaintiff hath a right to Dower out of it."(*w*) This doctrine is now generally considered as over-ruled, and does not seem to have been ever much relied on. In the subsequent case of Crabtree v. Bramble,(*x*) Lord Hardwicke observed, although without referring to Banks v. Sutton, "that it must be allowed equity follows the contracts of parties in order to preserve the intent, by carrying it into execution, which depends on this principle, that what has been agreed to be done for valuable consideration is considered as done, *and holds in every case except in Dower.*" This observation was applied more particularly to the case of money agreed to be laid out on land, as to which no doubt is now entertained that a woman is not dowable.(*y*) In Curtis v. Curtis, however, Lord Alvanley observed, "it is now too late to contend that the widow can have her dower out of any estate in which her husband had not the legal fee; for Banks v. Sutton is not now to be supported; not that there appears to have been any decision directly contradicting it, for Attorney General v. Scott did not mean to find fault with Banks v. Sutton. However it is now a settled point."(*z*) From the generality of the proposition that Dower can only be of an estate of which the husband had the legal fee, it seems

lowing rubric :—*Sacerdos interroget dotem mulieris; et si terra ei in dotem detur, tunc dicatur psalmus iste*, &c. When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali de omnibus terris et tenementis.* Bract. ib) the husband seems to have said "with all my lands and tenements I thee endow," and then they all became liable to her dower. When he endowed her with personalty only, he used to say 'with all my worldly goods' (or as the Salisbury ritual has it, 'with all my worldly chattel) I the endow,' which intitled the wife to her thirds, or *pars rationabilis* of his personal estate, which is provided for by Mag. Ch. cap. 26, though the retaining the last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance which she acquires during coverture out of her husband's personalty."

(*w*) 2 P. W. 706. 2 Eq. Ab. 385. (*x*) 3 Atk. 687.

(*y*) See 1 Ves. S. 176, 1 Bro. C. C. 499. (*z*) 2 Ves. J. 124.

quite *clear that Lord Alvanley intended to be understood that Banks v. Sutton was not law on any point on which it turned. [*137] Although a case where, if lands had been purchased, or conveyed, according to the terms of an agreement, the wife would have had a title of Dower *at law*, may certainly be distinguished from that of a mere common trust, it cannot be said in one case more than in the other that the husband *had* the legal fee.

The rule that a woman is not dowable of an equitable estate being once established, it follows, as a necessary consequence, that if the husband makes a mortgage *in fee* before marriage, the wife will not be dowable of the equity of redemption. If indeed the money was paid on the day named in the condition, the estate would revest in the husband, and the wife become dowable; but no subsequent payment of the mortgage money by the husband will render her dowable, if he dies before a reconveyance of the legal estate.

The question of Dower of a mere equity of redemption, like that of Dower of a trust, has undergone much fluctuation of opinion. In Banks v. Sutton, already cited, Sir J. Jekyll, after reviewing the cases which bore upon the question, declared that he "did not know nor could find any instance where a Dower of an equity of redemption was controverted, and adjudged against the dowress; and as there were authorities in cases less favourable, therefore he declared that the plaintiff being the widow of the person entitled to the equity of redemption of the mortgage in question (which was a mortgage *in fee) had a right of redemption."(*a*) [*138] But in the subsequent case of Dixon v. Saville,(*b*) the doctrine of Banks v. Sutton was, after long argument, over-ruled by the Lords Commissioners of the Great Seal, upon the ground that the question was nothing more than whether a woman was dowable of a trust, and that this point was so much settled that it would be wrong to discuss it much. This has been since recognised to be the law by universal practice, and by several of the most learned judges.(*c*)

Mr. Powell in his Treatise on Mortgages has observed, that "it is necessary to remark that there were some circumstances which distinguished the case of Banks v. Sutton from this of Dixon v. Saville, particularly that, in the former case, the mortgage was made by the ancestor of the husband, whose widow claimed Dower, and the estate came to him by devise subject thereto; also, that the testator seemed to have intended, that the mortgage should be paid off out of his personal estate, and the rents and profits of the real estate, which would accrue before the devisee attained his age of twenty-one, at which time a moiety of the legal estate was positively directed to be conveyed to him. For although the former circumstance of the mortgage descending does not appear to me to afford any argument of considerable weight in favour of the dowress, because the only inference that could be drawn from *that circumstance would be, that the mortgage being [*139] made by the ancestor, and not by the husband, it could not be concluded that there was any intention in the husband to make the mortgage a means of depriving the wife of Dower (which was a distinction that had

(*a*) 2 P. W. 718, 719. (*b*) 1 Bro. C. C. 326. 2 Pow. Mort. 720.
(*c*) See 3 Bro. C. C. 265, per Lord Thurlow in Williams v. Lamb. 2 Sch. & Lefr. 388. per Lord Redesdale in D'Arcy v. Blake.

been attempted to be made, in cases when the wife claimed Dower of trusts, between trusts descending, and trusts made by the husband,) but which inference could not be applied to the case of a mortgage, because whether that descended to, or was made by the husband, the intention with which it was made, was obviously with a view to raise money only, and could not by any argument be made to supply an inference, that it was done with a view to prevent Dower: yet the latter circumstance might perhaps be considered as deserving more weight; for, if the trustee, who was himself the mortgagee, by misapplying the personal estate of the testator, and the rents and profits of his real estate, was himself the cause of the mortgage standing out, and made this a reason to hold back the conveyance of the legal estate, according to the directions of the testator, there seems as much occasion for the application of the rule of equity of *considering that as done which ought to be done* in order to let in the widow, in equity, to the same degree of title notwithstanding the mortgage, as she would have had if the trustee had conveyed the estate to the husband at the time directed, as there was for the application of it for that purpose, *notwithstanding a trust.*

"And it is observable that in this point of view, the cases of Banks v. Sutton and Dixon v. Sir Geo. Saville, are perfectly reconcileable, and
[*140] may stand *together, the former being considered as establishing the general principles of law, that the wife of one entitled to an equity of redemption of a mortgage in fee, shall not be entitled to Dower out of such estate; the latter, as an exception to that general rule, as falling under another and distinct principle of equity. *Sed quære.*"(*d*)

These observations, of the value of which Mr. Powell himself appears to have entertained doubts, will probably be considered as disposed of by the result of the authorities already considered as to trusts.

The case of a mortgage for years, differs, as relates to Dower, in this, that there is a legal reversion to which the equity of redemption is knit, and of which legal reversion the wife is dowable. As it is the doctrine of courts of Equity, that every person having an interest in the reversion shall have an equivalent interest in the equity of redemption, the dowress may consequently redeem the mortgage. This point will be considered in a subsequent chapter, which treats of the nature and incidents of an estate in Dower.

[*141]

*CHAPTER VIII.

Of the circumstances under which A TITLE OF DOWER *will be* DEFEATED *after having once attached.*

It has been already shown that titles of Dower attach upon estates of inheritance, notwithstanding those estates are defeasible by reason of defect of title.(*a*) But, Dower being an interest annexed to the defeasible estate, the avoidance of the right to that interest is consequential upon

(*d*) 2 Pow. Mort. 731.

(*a*) See p. 37, 50, supra.

the restoration of the seisin under the prior title.(*b*) In these cases, the seisin of the husband is not merely determined, but it is defeated; or, as the old books still more expressively term it, disaffirmed. The restoration of the original seisin is not considered as merely a giving back to the owner of that which had been unjustly taken from him, with all the prejudice of an intermediate ownership, but, in intendment of law, it is considered as purging and abolishing the intermediate seisin, and all its consequences, and for purposes of title, negativing the existence of such seisin. The person having the right is not to be merely restored, but he is to be placed *in statu quo.*(*c*)

Therefore, if the owner of an estate is disseised, and the disseisor marries, and afterwards the disseisee enters upon, or recovers against the disseisor, *the title of Dower in the wife of the disseisor [*142] is thereby defeated;(*d*) and if the disseisor had died seised, and his heir had actually endowed the wife, and the disseisee had recovered the lands by judgment against the heir and dowress, the estate of the dowress would be at an end.(*e*) So, if a man seised in right of his wife, before the statute of 32 Hen. VIII. c. 28, made a discontinuance of his wife's lands, and after his death, the wife recovered the lands against the discontinuee, the wife of the discontinuee should not have Dower of these lands, for the seisin of her husband was defeated by elder title.(*f*)

The wife of a bargainee or releasee of a tenant in tail, is in like manner defeated of her Dower by the entry of the issue.(*g*) In a note to Mr. Serjeant Williams's edition of Saunders's Reports,(*h*) Margery Cally's case (24 E. III. 28. *b.*) has been cited with disapprobation, as *inconsistent with this doctrine. "In that case (the learned [*143] Serjeant remarks), the tenant in tail who had released to the husband of the demandant in fee, was dead, and the demand of Dower was against the issue in tail, *who had entered*, and thereby determined the estate in fee out of which the Dower was claimed." Margery Cally's case, however, is strictly consistent with the general principle of law on this head. That case was determined upon another ground, overlooked by the learned editor of Saunders, that the lease and release of the tenant in tail being *with warranty*, was considered to work a discontinuance, and therefore the entry of the issue was not congeable. The case is correctly stated below.(*i*)

(*b*) Gilb. Uses. 399. (*c*) See Litt. sec. 358; 1 Roll. Abr. 474, &c.

(*d*) Countess of Barkshire v. Vanlore, Winch. 77.

(*e*) As to the lands assigned to the wife in dower, it is not necessary that the disseisee should resort to a real action, notwithstanding a descent cast, for the endowment defeats the descent *quoad* those lands, and the disseisee may therefore bring ejectment against the dowress. See Co. Litt. 240. *b.* But, "if after the dying seised of the disseisor, the disseisee *abate*, against whom the wife of the disseisor recover by confession in a writ of dower, in that case, though the descent be avoided, yet the disseisee shall not enter upon the tenant in dower, because the recovery was against himself; but, if he had assigned dower to her in pais, some say he should enter upon her. Ib. 241. *a.*

(*f*) Dyer. 41. *a.* citing a case in the time of Ed. 1. In that case, the wife of the discontinuee recovered her dower for bad pleading on the part of the tenant, "which she could not have done (adds Dyer) had the pleadings been good."

(*g*) 10 Co. 96. *a.* 98. *a.* in Seymour's case. (*h*) Vol. 1. p. 261. *a.*

(*i*) Dower, land was given to husband and wife in tail, who had issue two sons; the baron dies, the feme makes a lease for years to the eldest son, and afterwards releases to him all her right *with warranty* to him and his heirs, and he takes a wife, and dies in the lifetime of his

The law of remitter affords another example of the avoidance of the title of Dower, attended with the peculiarity that the seisin of the husband, and consequently the title of Dower, is defeated in the instant of his death. Thus, if a man seised in tail general, discontinues in fee, and takes back an estate *in fee simple, and afterwards takes a [*144] wife, and has issue, and dies, the title of Dower which attached upon the seisin of the fee, is defeated by the remitter of the issue to the estate tail;(*k*) for the seisin of the fee being cast upon the issue, immediately upon the death of the husband, the issue is consequently restored to the estate tail, and thus the seisin of the fee, with all its incidents, is defeated, or, as Lord Coke emphatically expresses it, "vanished by the remitter," to the same extent as if the issue had recovered by formedon. So, if lands are given to husband and wife in special tail, who discontinue by fine *sur grant and render* at the common law, and retake an estate in tail general, and have issue, and the wife dies, and the husband marries a second wife and dies, in this case also the title of Dower of the second wife is defeated by the remitter.(*l*) But, it is said, that if in such case, a stranger abates upon the death of the husband, the issue may bring a formedon of which estate tail he will; and, if he brings his action of the gift by which the wife should be dowable, he shall not be remitted, and the wife shall have her Dower.(*m*)

A similar case of remitter is cited by Fitzherbert, in the instance of a man, who having a right of action, disseises the tenant, and dies seised, whereby his heir is remitted, and the wife's title to Dower consequently defeated, "for that estate which the *husband had is deter- [*145] mined, for that was an estate in fee by wrong, and the heir hath the estate in fee which his ancestor had by right."(*n*)

It is an important point in pleading, that in these, and most other cases of the same nature, where there was a seisin in the husband during the coverture, but which seisin has been defeated, the tenant to the writ of Dower, must *plead* the special matter, as the remitter, &c. and cannot give it in evidence upon the general issue of *ne unques seisie que Dower*, &c.; for, upon that issue, the charge of the jury is solely upon the seisin, and they must find for the demandant.(*o*)

It has been already stated, that a recovery by judgment against the husband in a real action, defeats the title of Dower of the wife. This proposition must, however, be understood as confined to recoveries by actual title, and does not extend to feigned or common recoveries. By the statute of Westminster 2, c. 4, it is recited, that by the common law,

mother, without issue, and after the mother dies, and the second son enters, and the feme of the eldest son brings writ of dower and recovers judgment, 24 E. 3. 28; Bro. Dow. pl. 50. This case was indeed considered doubtful at the time, upon the question whether the release with warranty did work a discontinuance, for it seems, adds the book, that the release with warranty of the tenant in tail, is only a grant of her estate, and although she gave a fee, yet the younger son is remitted to the tail, which is paramount the title of the feme now demandant.

(*k*) Fitzh. N. B. 149 (F.) (cites 41 E. 3. 30.) Dyer. 41. *a.*; and see 1 Leon. 37, in Partridge v. Partridge, Co. Litt. 31. *b.*; Gilb. Uses. 393; 1 Leon. 66.

(*l*) Bro. Dow. pl. 14 (cites 44 E. 3. 26.)

(*m*) Hughes Writs. 152 (cites 46 E. 3. 24.)

(*n*) F. N. B. 149. (F) (cites 16 E. 3. 21.) Gilb. Dow. 393 (cites 10 E. 3. 27.)

(*o*) Dyer. 41. *a.*; 1 Leon. 66; Co. Litt. 31. *b.* Osmond's case, Noy, 66; but see Countess of Berkshire v. Vanlore, Winch. 77, contra.

where a husband being impleaded, had given up the land demanded to his adversary, *de plano*, viz. by reddition, the justices upon a writ of Dower brought by the wife would adjudge her her Dower. But that where the land was lost by default, there was a difference of opinion; some justices holding that the widow was, and others that she was not *entitled to Dower. To remove this doubt, it was declared by that statute, that in both cases the woman demanding her [*146] Dower should be heard; and if it was alleged against her that her husband lost the land by judgment, so that she ought not to have any Dower, and upon inquiry it was found to be a judgment by default, then that the tenant should further show that he had and hath right in the land according to the writ which he had brought against the husband; and if he proved the husband had no right, nor any one but himself, then that the judgment should be *quod tenens recedat quietus*, and *quod uxor nihil capiet de dote;* but if he could not show that, then that the woman should have judgment *quod recuperet dotem suam.*

Perkins remarks, that the statute of Westminster 2, cap. 4, is but a recital of the common law; "for, the common law ought to be intended where the husband had right, and he who recovereth no right; and so is the law at this day, if the husband lose by default, &c. And so was the common law before the making of that statute; so that statute is but an affirmance of the common law on that point.(*p*) And therefore, at the common law, before the making of that statute, if a man had been seised of land in fee by a rightful title, take a wife, and is disseised, and reentereth upon his disseisor, and his disseisor arraign on assize against him, and he confess the disseisin, and the disseisor releaseth the damages, and hath judgment to recover, and entereth, and the husband dieth, his wife shall recover *her Dower against him who recovered [*147] in the assize by the common law; because that her husband had right, and he who recovered no right.(*q*) And if a disseisor be of land, who taketh a wife, and the disseisee releaseth all his right unto the disseisor, and, notwithstanding that, brings a writ of entry in nature of an assize against the disseisor, and recovereth by default, and the disseisor dieth, his wife may recover her Dower against the disseisee, because at this time her husband had right by the release, and the disseisee no right.(*r*) But if he who recovereth by reddition or by default had right, then it shall be otherwise. And therefore, if the heir of a disseisor of land be in by descent, upon whom the disseisee doth enter, and taketh a wife, against whom the heir of the disseisor doth recover by reddition, or by default in a *writ of entry in the nature of an assize*, and the husband die, in this case his wife shall not recover her Dower by writ, because he that recovered had right unto the possession *according to the nature of his action;* and the husband was not seised of other possession during the coverture but of that possession which is destroyed and defeated by the recovery.(*s*) But, if a man seised of land in fee, take a wife, and is disseised, and the disseisor dieth seised, and his heir is in by descent, upon whom the disseisee doth enter, against whom the heir of the disseisor doth recover by reddition, or by default in a writ of entry in the nature of an assize, and the husband dieth, his wife shall

(*p*) Perk. sec. 376.
(*q*) Perk. sec. 377.
(*r*) Ibid. sec. 378 (cites M. 15 E. 3. 30.)
(*s*) Ibid. sec. 379; and see 2 Inst. 350.

[*148] recover her Dower *notwithstanding that he who recovered had right unto the possession according to the nature of his action; and the reason is because the husband had an ancient seisin during the coverture before the writ brought in which the recovery was, by force of which seisin the wife had title to have Dower, and the ancient seisin is not defeated and destroyed by the recovery."(*t*)

It will be seen from the two latter of these cases, that under the complicated modifications of seisin contemplated by the old black-letter law, it sometimes happened that the seisin of the husband which he had during the coverture would be defeated, and so the wife's title of Dower avoided, though the right remained in him; and at other times, that the Dower would be preserved, although the seisin was defeated in like manner, by reason that some distinct seisin had attached in the husband at a previous time during the coverture, and which the nature of the action by which his subsequent seisin was defeated did not reach. It is to be observed, that in the case put by Perkins in sect. 379, the husband is disseised before marriage, and in the following section not till after marriage. Now, as the right of entry upon the disseisor was taken away by the descent cast, and as a man cannot be remitted on his own tortious entry, when the husband enters upon the heir he acquires a wrongful seisin, distinct in the one case from his right, and in the other from his ancient seisin, and therefore defeasible by re-entry, or recovery, in

[*149] a possessory action. In the *former case, the wife cannot be endowed because the only seisin which the husband had *during the coverture* is avoided by superior title; and of the right of action she is not dowable; in the latter case, the ancient rightful seisin of the husband being untouched by the recovery in the possessory action, supports her right to be endowed against the recoveror.

It appears also that although the husband had not right to the lands, yet, if a degree was past, so that he had acquired a *jus possessionis*, and the action brought against him was only a possessory action, or in other respects was not such as the land could be recovered upon, unless by laches of pleading in the husband, the wife may falsify this recovery. As "if a disseisor be of one acre of land, and the disseisor dieth seised, and his heir enter and taketh a wife, and the disseisee doth recover the land against the husband by default in a writ of entry *ad terminum qui præteriit*, and the husband die, his wife shall falsify this recovery in a writ of Dower."(*u*) So that the wife may falsify not only where the recoverer had not right to the land, but where, although he had right to the land, he had not right to recover by the particular action in which he obtained judgment. And generally, for false pleading in the husband, where he might have pleaded in bar to the action, and not merely in abatement, the wife may falsify. As "if in a writ of entry *en le post*

[*150] against the husband, he vouch himself to save the tail, and sheweth for cause that his father gave the *same land unto him in tail, and that the reversion is descended unto him from his father and the demandant traverseth the gift, which is found with him, by reason whereof he doth recover, and the husband dieth, now, if the husband had a release of all actions, or of all the right of the demandant, to plead,

(*t*) Perk. sec. 380 (cites H. 14 H. 4. 31. H. 5 E. 3. 7.)
(*u*) Perk. sec. 384.

and did not plead the same, his wife shall falsify this recovery in a writ of Dower.(*v*) And, if tenant in tail of land hath issue, and dieth, and a stranger abateth and dieth seised, and his heir is in by descent, who taketh a wife, and the issue in tail bring an assize of *mort-d'ancestor* against the husband, who traverseth the points of the writ, which are found for the demandant, by force of which he doth recover and entereth, and the husband dieth; in this case it hath been said that the wife shall not recover Dower of this land, before that this verdict be attainted by the heir in a writ of attaint. Yet, it seemeth she shall falsify this recovery in a writ of Dower, immediately after the death of her husband; forasmuch as her husband might have pleaded unto the action of the writ of the demandant, and she cannot have an attaint. And if she shall stay until the heir hath defeated the verdict by attaint, then, perhaps, the heir will release, &c. or perhaps will not sue an attaint; and so the wife in despite of herself shall loose her Dower; which is not reasonable when she was once entitled to have Dower by the possession of her husband during the coverture; which possession had never been avoided, if not by the laches or pleading of the husband; because *he might have pleaded unto the action of the writ [*151] of the demandant, &c. *tamen quære;* because that the judgment is given upon the verdict; within which verdict is found matter contrary and repugnant to the matter which ought to be pleaded to the action of the writ, &c. but if the entry of the demandant had been lawful, then the law is clear, and without question, that the wife shall not falsify; for then the demandant had been remitted by his entry."(*w*) "But it is to know that a demandant in a writ of Dower shall not falsify a recovery had against her husband by default, for laches of her husband in not pleading a plea which goeth merely in abatement of the writ, if not that it be in special cases. And therefore, to say that her husband might have pleaded misnomer, &c. or jointenancy, &c. are not causes to falsify a recovery.(*x*) But if she shew matter proving that the demandant had not right, nor cause of action, if not jointly with a stranger, the which stranger by his deed of release, which she sheweth forth, hath released all his right unto her husband (then tenant of the land,) before the action brought by the demandant, this is a good matter to falsify the recovery for one moiety of the land recovered. So shall it be of all such like cases."(*y*) "And it is to know, if in a præcipe brought against the husband he plead misnomer, which is found against him, by force of which the demandant doth recover, such recovery shall not oust the wife of her Dower, if the demandant had not right. And if in *a præcipe, &c. against the husband, the husband plead [*152] jointenancy, &c. which is found against him, by force of which the demandant doth recover, this recovery shall not oust the wife of her Dower, unless the demandant had right."(*z*)

It will appear from the last passage, that the wife may falsify recoveries by action tried, as well as recoveries by reddition and default. This, however, must be understood with the qualification, that the falsification is in another point than the point which was tried. Thus,

(*v*) Perk. sec. 382 (cites E. 12 E. 4. 140.)
(*w*) Perk. sec. 383.
(*x*) Perk. sec. 385.
(*y*) Ibid. sec. 386.
(*z*) Perk. sec. 381 (cites H. 5 E. 3. 7.)

where the husband pleads dilatory pleas, as in the cases put by Perkins, the wife may falsify, for this recovery does not disaffirm the possession of the husband.(*a*)

It may be useful to remark, that in all such cases of falsification of recoveries suffered by husbands, by their widows, the widow shall falsify the recovery as to her title of Dower only, and no longer or further.(*b*)

The implied *special* warranty upon an exchange *at common law*, affords another instance of the avoidance of the title of Dower by the seisin of the husband being defeated by title paramount. For if A. and B. exchange, and B. marries, and A. is evicted of the land taken in exchange, he may recover in value against B. the land given in exchange, [*153] and the wife of B. will thereby lose her Dower, for the recovery in value is paramount the title of Dower, *by relation to the time of the exchange made, which was before the marriage.(*c*) The same law is stated as applicable to a partition between coparceners in gavelkind, where, if one is impleaded, and prays in aid of the other, and the demandant recovers, the tenant shall have *pro rata* of that which remains, unaffected by the Dower of the other coparcener's wife, because the title of the coparcener who had *pro rata*, shall have relation to the time of the death of the ancestor.(*d*)

But if a man recovers by way of *recompense in value*, against the husband, by a *warranty ancestrel*, the wife shall be endowed, because the recovery there is simply by force of the warranty, and not by reason of any elder title to the land, and so the land is bound only from the time of the judgment.(*e*) The warranty here is only a collateral charge, and not a specific lien upon the land, as in the case of an exchange or partition.

The doctrine of the common law as to evictions by title paramount, applies also to persons re-entering by force of conditions, for, on the condition being called into operation, the estate defeated by it is considered as void *ab initio*, and the entry of the feoffor has relation to the time of the feoffment made.

[*154] Therefore, if there be tenant in fee, or in tail, **upon condition*, and the feoffor enters for breach of condition, or if there be a feoffment in fee upon condition, to be performed by the feoffor, who duly performs the condition, the wife of the feoffee is defeated of her Dower.(*f*)

It should also be remarked, that although only a portion of the estate of the husband is defeated by force of the condition, as where the condition is annexed to the freehold only, yet as the operation of that condition deprives the estate of that quality in respect of which the wife is dowable, and converts it into an estate in remainder or reversion, while

(*a*) See Bro. Dow. pl. 24, 26; Bro. Restore, &c. pl. 1.

(*b*) Shep. T. 49.

(*c*) 2 Roll. Vouch. (R. b.) pl. 4. Perk. sec. 309 (cites M. 4 E. 3. 52. T. 5 E. 3. 129.)

(*d*) Perk. sec. 310.

(*e*) Fitzh. N. B. 150 (D.) (cites 3 E. 3. Dow. 139, 149.) Gilb. Uses, 399; Hughes Writs, 162.

(*f*) 1 Roll. Abr. 474; Perk. sec. 311, 312, 317; Ley, 299, arg. But in this, as in many other cases already mentioned, the special matter must be pleaded, for upon the issue of *ne unques seisie que dower*, the jury must find for the demandant. Dy. 41. *a.*; Noy. 66.

the former seisin of the freehold is disaffirmed by the entry for breach of condition, the title of Dower is equally avoided as where the whole estate is defeated. In the cases already put, of lessee for life surrendering to the reversioner upon condition,(*g*) whereby the wife of the reversioner becomes dowable, if the lessee enter for condition broken, the title of Dower is defeated.(*h*)

To the same principle is to be referred the case put by Lord Coke —"If there be grandfather, father, and son, and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is *endowed of one acre, and dieth, the wife of the father shall be endowed only of the two acres residue, [*155] for the Dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law, or actual,) is defeated; and now upon the matter, the father had but a reversion expectant upon a freehold, and in that case *Dos de dote peti non debet*, although the wife of the grandfather dieth living the father's wife."(*i*)

But if the father had taken by purchase, instead of by descent, and been seised previous to the consummation of the grandmother's title of Dower, this seisin would not have been defeated by the subsequent endowment. Lord Coke adds, "Here note a diversity between a descent and a purchase. For, in the case aforesaid, if the grandfather had enfeoffed the father, or made a gift in tail unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother; and the reason of this diversity is, for that the seisin that descended after the decease of the grandfather to the father is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift that took effect in the life of the grandfather (before the title of Dower of the grandmother was consummate) is not defeated, but only *quoad* the grandmother, and in that *case there shall be *Dos de dote*."(*k*) In the first instance, the seisin of the wife after endowment takes effect [*156] by relation from the same instant of time in which the seisin of the heir commenced, namely, the death of the ancestor, and being in point of title paramount the title of the heir, this seisin by relation defeats the mesne seisin which was cast upon the heir, even though that seisin was perfected by actual entry; for the technical rule is, that there is no mesne seisin between the husband and the tenant in Dower: but in the latter case, the seisin which the father had by force of the feoffment or gift in the life-time of the grandfather cannot be defeated by a seisin in the grandfather's wife, which even by relation cannot be carried farther back than the instant of the death of the grandfather. If, therefore, the father was married at any time during the existence of that seisin, and before it was turned into a reversion by the endowment of the grandmother, that seisin will confer a title of Dower upon the wife of the

(*g*) Supra. p. 75.
(*h*) But the tenant must plead the special matter. Osmand and Uxor, Noy, 66.
(*i*) Co. Litt. 31. *a*.
(*k*) Ibid. (cites 5 E. 3. tit. Vouchee. 249. Paris's case, 9 E. 3, 4.) and see Perk. sec. 315.

father, and she will be dowable of the third part, subject only to the estate of the grandmother; and therefore, in Paris's case,(*l*) where the grandfather had given the lands to the father in tail, who died, and the son endowed the wife of the father of the third part of the whole, and afterwards the grandfather died, and his wife brought her writ of Dower against the wife of the father, who vouched the son, and the question was of how much she *should recover in value, whether of a third of two parts, or a third of the whole; it was adjudged that she should recover generally to the value which she lost; for Dower tolled the estate which by law descended, but not the estate acquired and gained by purchase.

[*157]

But Dower must be actually assigned, in order to defeat the mesne seisin of the heir. And if the wife of the ancestor recovered Dower by erroneous judgment against A. and the judgment is reversed, although after the death of A., it seems that the mesne seisin of A. would be revived, and consequently his wife will be entitled to Dower.(*m*) And, although there had been no mesne seisin, yet, if judgment had been reversed in the lifetime of A., and the estate of freehold in the wife of the former owner thereby avoided, and the reversion turned into possession, it is clear that the wife of A. would be dowable. But it seems that it is immaterial that the assignment of Dower was against common right.(*n*)

Where the husband is seised, at any time during the coverture, of such an estate as was in its nature subject to the attachment of Dower, it may be laid down as a general rule, that the title of Dower will not be defeated by the *determination* of that estate by its regular and natural limitation. To such an estate Dower is a necessary incident;(*o*) it is by implication of law so annexed to the limitation itself as to form an incidental part of the estate limited; *the prolongation of the estate therefore in the dowress is not repugnant to that limitation, but strictly consistent with it.(*p*) A simple limitation can never operate to determine an estate while any portion of the interest implied in that limitation is still subsisting.

[*158]

Thus if there be tenant in fee of land, who takes wife, and dies without heir, it seems his wife shall be endowed against the lord claiming by escheat.(*q*) And if the grantee of a rent in fee dies without heir, his wife shall be endowed of the rent, although it is determined; and she shall demand it of the tenant of the land, who, although he has not the rent, yet, in fiction of law he is tenant to the writ of Dower, to avoid mischief and delay; and, although he has not the rent, yet he has the land out of which the rent issues, and the tenant of the land pays it.(*r*)

In like manner it was held by the court, in Paine's case, that "at the common law, if lands had been given to a woman, and the heirs of her body, and she had taken a husband, and had issue, and the issue died, and the wife also without issue, whereby the inheritance of the land did

(*l*) 5 E. 3. Vouch. 249; 4 Co. 122. (*m*) 7 H. 5. 4; Co. Litt. 15. *a.* n. (7.)

(*n*) Hughes Writs, 149; see p. 54. supra. (*o*) See p. 82. supra.

(*p*) Another reason is assigned in one of the books; viz. that the estate is determined by the act of God. Old N. B. 144.

(*q*) See Bro. Tenures, pl. 33; Bract. 297. p. 2. The escheat by reason of crime turns upon different principles, and there the wife is not dowable. Vide infra.

(*r*) Jenk. p. 5.

revert to the donor, in that case the estate of the wife is determined, and yet the husband shall be tenant by the curtesy, for that it is *tacitè* implied in the gift."(*s*) In that *case, it was also decided, [*159] that the same doctrine applied to estates tail since the statute *De donis*, the title of the husband to be tenant by the curtesy, and of the wife to be tenant in Dower, not being restrained by the statute. Lord Coke's report of the judgment concludes in these words. "And if tenant in tail takes a husband, and hath issue and dies, now the husband, is tenant by the curtesy; and although afterwards the issue dies without issue, so that the estate tail is determined, yet his estate shall continue, *for it is not derived merely out of the estate of the wife, but is created by the law, by privilege and benefit of law tacitè annexed to the gift.*" Consistently with the same exhibition of the law, the continuance of the estate of a dowress in this case, is designated in another part of Coke's Reports, as "*quodammodo* a continuance of part of the estate tail."(*t*)

Accordingly, if the donor enters, and does not assign Dower, the wife shall recover the third part in Dower against him.(*u*)

The rule that the wife shall be endowed of an expired estate tail has been denied by Lord Chancellor Talbot, in the case of Chaplin v. Chaplin,(*v*) to apply to a rent *de novo* granted in tail, but it appears upon a mistaken impression of the subject. His lordship observed that supposing a rent in tail created *de novo*, the remainder in fee whereof was extinguished by a limitation of it to those who had the *land, [*160] such rent being determined by the death of the husband tenant in tail without issue, and having no longer any existence, the wife cannot be endowed of that which is not in being. The case of Chaplin v. Chaplin was evidently taken up suddenly, and was ultimately determined upon another ground. Upon the point alluded to the law is otherwise. The very case is put by Jenkins. "A grantee of a rent in fee or in tail takes a wife, and dies without an heir, his wife shall be endowed."(*w*) There is indeed no real distinction, for the purposes of Dower, between an estate tail in land, and an estate tail in rent. In both cases, Dower is incident to the limitation of the estate tail, and if it is a part of the interest comprised in the limitation, the rent is as much *in esse* as to the dowress, as it was as to the tenant in tail, and it is immaterial that the heir of the husband has nothing of which the wife can demand Dower: for had the husband released the rent to the terre-tenant, there would have been nothing to demand of the heir, yet she might have her writ against the terre-tenant: for, as Jenkins remarks in the passage already cited, although the tenant of the land has not the rent, yet he has the land out of which the rent issues, and the tenant of the land pays it.

The case probably which occurred to Lord Talbot, and which he confounded with the grant of a rent in tail, turns quite upon another

(*s*) 8 Co. 68. 71 (cites 30 E. 1. Form. 66.)

(*t*) 7 Co. 73. See also Litt. sec. 53; Co. Litt. 31. *b*. 241. *a*.; Perk. sec. 317. F. N. B. 149. (G.); Bro. Dow. pl. 86.

(*u*) Perk. sec. 317. (*v*) 3 P. W. 229.

(*w*) Jenk. p. 5. So also in Lord Hale's notes to Co. Litt. 30, *a*. he observes that if a rent *de novo* be granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy.

principle, viz. where a rent is *reserved* upon a gift in tail, and here, [*161] *without doubt the wife shall not have Dower of the rent after the estate tail is determined; but here the estate of the husband *in the rent* is not an estate tail, but a fee with a determinable quality, in respect that it is reserved on a tenancy in tail, and when the tenancy is determined there is no estate for the reservation to act upon.(*x*)

It was admitted in Chaplin v. Chaplin that if a rent *in esse* is granted to A. in tail, remainder to B. in fee, and A. marries, and dies without issue, or if a rent *de novo* is granted to A. in tail, remainder to B. in fee (which has been adjudged a good rent) and A. marries, and dies without issue, in these cases his wife should be endowed.(*y*) The ground then of the erroneous distinction taken by Lord Talbot clearly was, that in the principal case there was no person, after the death of the husband, who had the rent substantively, and of whom, as having it, Dower could be demanded of it. Whereas in fact, Dower being incident to the estate limited in the rent, and that estate not having been abridged by any collateral determination, *the land* remained charged with the rent *quoad* the Dower, and to the extent of the one-third, as much as it was charged with the whole in the time of the husband, and it matters not that there [*162] *was no person entitled to the other two parts, as rent; but in the case of a rent reserved upon an estate tail which is determined, the land itself, or at least the estate in the land, in respect of which the rent was payable, is gone, and there is no person against whom the writ can be brought.

As a consequence of the prolongation of the estate in these cases for the benefit of the dowress, it follows that all charges or derivative interests created by the tenant in tail prior to the title of Dower, although void as against the reversioner, or remainder-man, will be revived against the dowress, *quoad* the part held in Dower. As in the case put by Coke; "if tenant in tail make a lease for years reserving 20*s*., and after take a wife, and die without issue, now, as to him in the reversion, the lease is merely void; but if he endow the wife of tenant in tail of the land (as she may be though the estate tail be determined) now is the lease, as to the tenant in Dower (who is in of the state of her husband), revived again as against her, for, as to her, the estate tail continueth; for she shall be attendant for the third part of the rent and services, and yet they were extinct by act in law."(*z*)

It is understood that titles of Dower are defeated by the determination of estates of inheritance by the operation of *collateral limitations*. It is clear law that where a man makes a gift in tail reserving rent to him [*163] *and his heirs, and the donee dies without issue, the wife of the donor shall not be endowed of the rent;(*a*) and if she has been previously endowed thereof, her Dower shall cease by the deter-

(*x*) Vide infra. That a woman is dowable at all of such a rent seems to prove, that notwithstanding the statute *de donis* has made a rent reserved upon a gift in tail incident to the reversion, so that there can be no estate in the rent so far as it is incident, yet, as against the wife of the donor claiming her dower. the rent is still a rent in gross, the statute *de donis* not extending to wives claiming dower or husbands claiming curtesy.

(*y*) And see Co. Litt. 30 *a*. S. P. as to Curtesy.

(*z*) Co. Litt. 46, *a*. 7 Co. 9 *a*. (cites 1 Roll. Abr. 842. 10 E. 3. 26. 34 Ass. 15. 23 E. 3. Dow. 130.)

(*a*) F. N. B. 149, (G.) (cites 10 E. 3. Avowry, 159.) So as to Curtesy, Co. Litt. 30, *a*.

mination of the tenancy.(*b*) The reason of this, according to Jenkins, is because "this is a collateral limitation."(*c*) He adds, "So of a grant of rent or land to one and his heirs till the building of St. Paul's shall be finished, if this contingency happens, Dower shall cease; as in the other case, where, after Dower, the donee dies without issue, where the rent is reserved upon the said gift in tail."(*d*)

In like manner, it has been held, and is undisputed in law, that if A. grants a rent out of certain land to B. and his heirs, provided that if B. die, his heirs being within age, that during the non-age the terre-tenant shall be quit of the rent; and B. marries, and dies, his heir within age, and the wife of B. recovers Dower of the rent, execution shall be stayed *till the heir comes to full age.(*e*) This case shows that if the rent had been made to cease *absolutely* upon the event, [*164] the Dower would have been at an end.

The point already stated as to a gift in tail applies also as to tenancy and seignory, as is remarked by Perkins:—"If there be lord and tenant by fealty, and the lord taketh a wife, and the tenancy escheat unto the lord, and he enter and die; in this case it shall not be at the liberty of the wife to have Dower of the seignory or of the tenancy; but she shall be forced to take Dower of the tenancy: and the reason is, because that the seignory is determined during the coverture by act of law."(*f*) But it is said that, in this case, if the wife is endowed of the seignory, and *afterwards* the tenancy escheat, yet she shall retain her Dower of the seignory:(*g*) as "if there be lord and tenant by fealty and 12*d.* rent, and the lord take a wife and dieth, and his wife is endowed of the third part of the rent, and the tenant dieth without heir, so as the tenancy doth escheat, in this case the wife shall not be endowed of the tenancy, notwithstanding that it come in lieu of the seignory, because it was not in the possession and seisin of the husband, but she shall retain the rent which was assigned unto her as a rent seek, and shall distrain of common right."(*h*)

*Both in the case of the rent reserved upon a gift in tail, and the rent payable to the lord in respect of the tenancy, [*165] the reason assigned by Perkins for the avoidance of the title of Dower, that the rent is determined during the coverture by act of law, is perhaps more correctly expressed than that given by Jenkins, viz. that it is a collateral limitation. There is, however, little real difference between these cases and that of an estate to a man and his heirs till the building of St. Paul's shall be finished, except that, in the latter instance

(*b*) Arg. Moor. 39, pl. 126.

(*c*) Other reasons might be found why the dower should be defeated in this case. The reservation itself is in respect only of the tenancy, and can for no purposes exist longer than the tenancy. See Co. Litt. 30, *a*. And thus "if a man be seised of land in fee, and giveth the same land in tail unto a stranger, reserving to himself and his heirs 12*d.* rent, and for default of payment a re-entry, &c. and the donor taketh a wife, and dieth, and the heir of the donor entereth into the land for the condition broken, the wife of the donor shall not be endowed of the rent, nor of the land." Perk. sec. 317, (cites M. 44 E. 3. 31.) The reason of both cases is the same.

(*d*) Jenk. Cent. 1. Ca. 6.

(*e*) Fitzh. N. B. 149, note (a,) (cites 12 E. 3. Dow. 11. 22 E. 3. 19. 10 H. 7. 13. 5 E. 2. Dow. 153. 10 E. 3. 21. 46 E. 3. 24. 12 E. 3. Cond. 11.) 1 Co. 87, *a*. Perk. 327. Plow. 156. Jenk. 4, pl. 6. 10 Mod. 307.

(*f*) Perk. sec. 321.

(*g*) Moore 39, pl. 126. Arg.

(*h*) Perk. sec. 323.

the determination of the estate is the result of an express collateral limitation, while, in the former instances, it is the result of a collateral limitation implied by law. In this point of view, the cases already noticed, where the title of Dower is defeated by the determination of the estate out of which it is derived by reason of defect of title, as in determinable fees carved out of estates tail, &c. may be considered as falling within the same principle. In all these cases the rule *Cessante statu primitivo cessat derivativus*, applies to Dower.

And it may be propounded that the operation of a collateral limitation, whether express or implied, will defeat the title of Dower, as well where it converts the estate of the husband into an estate of mere freehold, as where it determines it altogether. An example of this may occur where the husband is tenant of a determinable fee derived out of an estate tail special, and during the coverture, the determinable fee becomes an estate *pur autre vie*, by the tenant in tail becoming tenant in tail after possibility of issue extinct.

[*166] In Mr. Preston's erudite treatise on Merger, this *point is adverted to, and treated as doubtful.(*i*) "It is clear (he observes) that a woman is not dowable of a mere estate for life, though that estate be descendible, or rather transmissible, to the heirs. The heirs take as special occupants; and as the estate is not of inheritance, the wife cannot be dowable in right of that estate. It is equally clear that a woman is dowable of a determinable fee, subject, except in some particular cases, to have her right of dower defeated when the estate of her husband determines. In the case under consideration, the husband may have a determinable fee at one time, and an estate for life at another time. A seisin of the inheritance during the coverture will confer a title to Dower. Can this title, when it has once attached, be defeated by the change of the estate of inheritance into an estate for life? This is the point to be discussed, but it is not easily solved. No decision which throws any light on the question has been found. There is reason to think that as the wife was once dowable of her husband's seisin, no change in the *quality* of her husband's estate will defeat that right of Dower, as long as *the husband's estate continues.* For it should seem the heir will take by descent, as heir, and not merely as occupant: and yet after the failure of the issue this is questionable. The wife claims only on the ground of a seisin of the inheritance, and not of the estate after it becomes a mere estate of freehold. Perhaps it may be contended that the grantee has continually an estate of inheritance, even after

[*167] the possibility of *issue is extinct. But it would be difficult to maintain that proposition, and, therefore, a wife whose claim of Dower rests solely on her husband's seisin, after the possibility of issue [in the tenant in tail] is extinct, appears to have but little chance of success in a suit to establish a right of Dower."

With the greatest deference to the source from whence these observations are derived, it is apprehended that the doubts suggested by them will vanish before an attentive consideration of the subject. If the title of Dower, after having attached, is defeated by an act of law producing an absolute determination of the estate, it follows, by parity of reasoning, that the title of Dower will be in like manner defeated by any act of law

(*i*) 3 Prest. Conv. 173.

which, without absolutely determining the estate, deprives it of that quality in respect of which alone the wife was dowable.

A case put by Plowden, though slightly distinguishable in circumstances, strongly illustrates the present question. "If a man makes a gift in tail, rendering rent, and afterwards the donor takes a wife, she shall be endowed of the rent; but if the donee is a woman, who dies, and her husband is tenant by the curtesy of the land, and afterwards the issue in tail die without issue, now the wife of the donor shall not have Dower of the rent; for her title of Dower was to be endowed of the rent of inheritance; and there cannot be an inheritance in the rent longer than the inheritance in the land endures; and so the one is in respect of the other; and since her title was to be endowed of the rent of inheritance, and now the rent is changed into a rent *for life only, and so is another degree, before the execution of her estate, it [*168] shall never be executed, for it would be repugnant in itself."(*k*)

It is a point upon which the authorities are not fully decisive, and upon which practitioners are disagreed, whether a title of Dower is defeated by the operation of a conditional limitation created by way of use, or executory devise. It might have been expected that, upon principle, the law upon this head should have been considered still more clear against, the right of the dowress than in the case of collateral limitations, the estate of the husband being in a more emphatical degree over-reached or defeated by the taking effect of the limitation over, while the prior estate has, from its circumstances, all the determinable quality of an estate with a collateral limitation. The decisions have, however, involved this point in much difficulty.

It is reported by Leonard as the observation of Anderson, J. in the case of Sammes v. Payne, that on a limitation of this kind created by way of shifting use, the wife shall be endowed although the estate is defeated by the happening of the event. The words of the report are, "If a feoffment be made to the use of J. S. and his heirs until J. D. hath done such a thing, and then unto the use of J. D. and his heirs, the thing is done and J. S. dieth, his wife shall be endowed."(*l*) It is singular that no *such point is mentioned in the report of Sammes [*169] and Payne in that judge's own collection, and that the reason immediately before assigned by Leonard for the decision in the principal case that the husband should have curtesy of an expired estate tail, is because the estate is "*spent and determined* by the dying without issue, and *doth not cease, or is cut off by any limitation.*"(*m*)

In the note of the same case by Goldsborough, the observation of Anderson is stated to be, that "if an estate be determined *by limitation*, this will not avoid a tenancy by the curtesy, but otherwise it is if the estate be determined by *a condition*, for this shall relate to the defeazance of the estate."(*n*) This mode of stating the point leaves the case of a conditional limitation untouched, and merely takes the broad ground of distinction between estates spent and estates defeated, for by limitation is here obviously meant a simple limitation. Too much stress has perhaps been laid in practice upon the dictum of Anderson, as given by

(*k*) Plow. 155, (cites 9 Ed. 3.) Hughes on Writs, 182, (cites 2 and 3 Ma. 155.)
(*l*) 1 Leon. 168. (*m*) 1 Leon. 168.
(*n*) Goldsb. 81.

Leonard; and as any opinion on the case of a conditional limitation was uncalled for in Sammes and Payne, and as the passage as given by Goldsborough is more decidedly relevant to the question before the court, and embraces the precise point of distinction upon which that case stands, it would seem to be at least as much entitled to credit as the observation adopted by Leonard. Should the reader in the sequel of these remarks agree with the author, that the position in Leonard does not correctly exhibit the law on the point, he *will at least think its weight in some degree neutralised by its being so differently stated by another reporter.

[*170]

The above mentioned case of Sammes v. Payne(*o*) is itself sometimes cited as an authority that Curtesy, and by analogy Dower, shall continue after the determination of an estate by the operation of a conditional limitation, or executory devise. This, however, seems owing to inadvertency. In that case, as reported by Leonard and Anderson, one Jane Payne being seised in fee of the lands in question, conveyed the same to the use of herself for life, remainder to the use of Elizabeth Payne her eldest daughter in tail, upon condition that the said Elizabeth or the heirs of her body, should within one year after the death of the said Jane Payne, or within one year next after Joan the younger daughter of the said Jane Payne should attain the age of eighteen years, pay to the said Joan or the heirs of her body 30*l.* And if the said Elizabeth should die without issue before the time of payment aforesaid, or if the said Elizabeth or the heirs of her body should fail in the payment of the sum aforesaid, then to the use of the said Joan Payne in tail. The mother died, Elizabeth took husband Thomas Sammes, had issue, and afterwards died, without leaving issue, and *before the said Joan came to the age of eighteen years.* It was argued that the estate tail of Elizabeth was defeated by the non-payment of the 30*l.* according to the limitation of the uses, and that therefore Thomas Sammes could not be tenant by the curtesy; but the Court *held clearly that he should be, "for (they said) as to the condition of payment of the said sum, the same is not determined, for she died without issue before the day of payment, *scil.* before the second daughter came of the age of eighteen years, and *as to that there is no condition broken,* and as to the point of dying without issue, the same is *not a condition,* but *rather a limitation* of the estate, and the same is no more than what the law saith, and the estate tail in Elizabeth is *spent and determined* by the dying without issue, and *doth not cease, or is cut off* by any limitation."

[*171]

The decision in this case, therefore, was merely that curtesy was not defeated by the determination of the estate by its natural limitation. So little indeed was this case considered by that profound lawyer, Lord Coke, as deciding any thing else, that he has reported it simply as the case of a gift to the elder daughter *in tail, remainder* to the younger daughter in tail.(*p*)

In the subsequent case of Flavill v. Ventrice(*q*) (10 Jac. 1.) the law was evidently considered as unsettled upon the point whether Dower shall be defeated by a conditional limitation, the judges being equally

(*o*) 1 Leon. 167. 1 And. 184. 8 Co. 67. Goldsb. 81.
(*p*) 8 Co. 67.
(*q*) 2 Danv. Abr. 655.

divided upon the question. The note of this case is in the following words. "If A. seised in fee of land, covenants to stand seised thereof to the use of himself and his heirs, till C. his middle son takes a wife, and after to the use of C. and his heirs; and after A. dies, by which it descends to B. the elder son of A., who has a wife, and dies, and after C. *takes a wife, it seems the wife of B. the elder son shall not be endowed of the said estate of her husband, *because his estate is determined by an express limitation*, and therefore the estate of the wife being derived out of it, this cannot continue longer than the original estate. P. 10. Ja. B., between Flavill and Ventrice, dubitatur upon a special verdict; for, upon argument, the court was divided. *Seil.* Crawley and Vernon, that she shall not be endowed, and Hutton and Heath, *e contra*. Intratur Tr. 8 Car. Rot. 1343." In Heyns v. Villars(*r*) (1658,) this case was cited at the bar, by the name of Rochester and Venters, and it was added, that it was a question to that day, whether the feme should have Dower. [*172]

Thus the law appears to have stood in Summer v. Partridge, at the Rolls, July 25, 1740 (a case which has been altogether overlooked in practice,) in which it was decided, that a title of curtesy *is* defeated by a conditional limitation by way of devise. The short note of this case given by Atkins is as follows. "A devise to A. and her heirs, and if she die before her husband, he to have 20*l.* a year for life, remainder to go to her children. The wife died before the husband.

"It is a rule, said the court, in the case of a tenancy by the curtesy, as well as in a tenancy in Dower, that the estate shall come out of the inheritance, and not out of the freehold. A tenancy by the curtesy, and a tenancy in Dower, are excrescences out of the inheritance, and a continuation of the inheritance for a certain time in the husband [or wife,] which would otherwise have ceased.

*"A tenancy by the curtesy must arise out of the inheritance which must vest in the wife, and there must be a possibility of its *descending* upon the children; now, they take here by virtue of the remainder over, not by descent from the mother, and there is no difference between making an estate of inheritance to cease in the wife the moment she dies, and to arise in the children, and a jointenancy. [*173]

"Neither a tenant in Dower or curtesy can entitle themselves to an estate in Dower, or curtesy, where the children [issue] who are left, cannot possibly take an inheritance, for, the moment of time the husband takes as tenant by the curtesy, the inheritance must descend upon the children, and therefore it is impossible, in the present case, to maintain the father is tenant by the curtesy."(*s*)

The reasoning of the court, so far as it is reported, although evincing a considerable command of the subject, fails to dispose of the point, whatever influence the judgment itself may have. That titles of Dower and curtesy are incidents of estates of inheritance alone is undeniable; but no inference arises from that as to the present question, which is simply whether the particular mode by which the estate of inheritance is defeated in the case of a conditional limitation, shall also put an end to the title of Dower, &c. The case of jointenancy is distinguishable

(*r*) 2 Sid. 66. (*s*) 2 Atk. 47.

on the old technical principle, that the survivorship disaffirms the seisin of the deceased co-tenant, and for purposes of title, negatives, *ab initio*, such seisin and all its fruits. The latter part of the *judg- [*174] ment assumes, that the possibility of the issue to inherit must continue to the time when the question arises by the death of the parent, a proposition for which it is not difficult to say the books furnish no authority.

It remains to call the attention of the reader to the case of Buckworth v. Thirkell(*t*) (1785), the leading case in modern practice on the point now under consideration.

In that case, Joseph Sutton devised to trustees in fee, in trust to receive the rents and profits, and apply them for the maintenance of Mary Barrs, the testator's grand-daughter, until she should arrive at the age of twenty-one years or be married; and from and after her attaining such age, or being married, she gave and devised the lands to the said Mary Barrs her heirs and assigns for ever. But, in case the said Mary Barrs should happen to die before she arrived at the age of twenty-one years, and without leaving issue of her body lawfully begotten, then, from and after the decease of the said Mary Barrs without issue as aforesaid, he gave and devised his said estates to his grandson, Walter Barrs, and to his assigns for his natural life, remainder over. Mary Barrs married Solomon Hansard, had a child, and afterwards died, under the age of twenty-one years, and without leaving any issue. On the trial of an action of replevin, at the Cambridge assizes, a special case was reserved for the opinion of the court upon the above facts, whether Solomon Hansard was entitled to be tenant by the curtesy. [*175] The case was *twice argued at the bar by desire of the court and the distinction was relied upon between estates spent or expired, and estates defeated by way of condition. With regard to the case of estates tail, they observed, that "before the statute *de Donis*, estates tail were conditional fees, but on the birth of a child, the condition was considered as performed, so as to become an absolute estate to three purposes: 1st, that the donee in tail could alien; 2dly, could forfeit; 3dly, it was descendible to the issue of a second marriage, and of course gave curtesy to the husband of a second marriage. The statute *de Donis* took away the power of alienation, and the curtesy of the second husband, but left the right of the husband of the first marriage to be tenant by the curtesy, as it stood before the statute [viz. notwithstanding a subsequent failure of issue], that is, as being the husband of a woman whose estate on condition was become absolute by birth of a son. This, (they observed), accounted for husbands being tenants by curtesy of estates tail, but it explained the difference between estates tail, and estates defeasible on condition, such as the present, and proved how inapplicable the case of an estate tail was to the present estate as to the right of the husband to curtesy.(*u*) On the other side it was argued, that this was a limitation conditional, and not merely a condition, for the defeazance has no relation to the time of creating the estate, as in the case of a condition merely, the breach of which avoids [*176] all mesne *incumbrances.(*v*) The judgment of the court is

(*t*) 1 Coll. Jur. 332 ; 3 Bos. and Pul. 652. n.; Butl. Co. Litt. 241; *a*. note.
(*u*) 1 Coll. Jur. 334. (*v*) 3 Bos. and P. 653. n.

stated to have been in the following words.—"Lord Mansfield. Tenancy by the curtesy existed before the statute *de Donis*, and the definition of it is, that the wife must be seised of an estate of inheritance, which by possibility her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional, or absolute, and curtesy applied to both equally. I cannot agree with the argument, that on performance of the condition by birth of a child the estate became absolute; it was so by a subtlety in odium of perpetuity, and for the special purpose of alienation, but for no other. It otherwise reverted to the donor on failure of the issue, according to the original restriction. At common law, the only modification of estates was by condition. The Statute of Uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities, by means of the extensive operation of that statute; and, in the time of Elizabeth and James, many cases were decided with a view to prevent that effect; with this view, it was allowed to bar contingent remainders before the person who was to take came into *esse;* others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were to much loosened, and it became necessary to restrain them again; and in the time of the troubles, eminent lawyers who were then chamber counsel, devised methods, which on their return to Westminster *Hall, they put in practice, [*177] such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being, and twenty-one years afterwards.

"It is contended, that this is a conditional limitation. It is not so, but a contingent limitation; all the cases cited go upon the distinction of their being conditions, and not limitations. During the life of the wife, she continued seised of a fee simple, to which her issue might by possibility inherit. I am of opinion, that the defendant is entitled to be tenant by the curtesy.

"The rest of the court assenting, judgment for the defendant."(*w*)

The former portion of Lord Mansfield's observations appears to be little more than a skirmishing with the arguments which had been used at the bar, and to bear very slightly, if at all, upon the grounds of the decision. The latter passage, in which he is made to assign as a reason for his decision, that it was *not* a conditional limitation, is not easily reconcileable with the case stated. The original limitation to Mary Barrs was expressly a limitation of the fee, and the subsequent estate being limited in derogation of that fee, and not upon the determination of a prior particular estate, was necessarily *a conditional limitation. If it was not so, it is difficult to conjecture what Lord Mansfield understood by a conditional limitation. It might perhaps be thought, that his Lordship's observations, as above stated, merely intended to take the distinction between a limitation, and a condition, properly so called. But the language as stated in the report of the [*178]

(*w*) 3 Bos. and P. 652. n. A case of Goodenough v. Goodenough, in 1775, is mentioned in the 3d vol. of Mr. Preston's Treatise on Abstracts, p. 372, as a similar decision upon dower. This case does not appear to be reported.

case in *Collect. Jurid.* is still more irreconcileable with any correct view of the law, in application to the facts of the case stated. It is as follows—"Now, it is contended, that this is a conditional limitation: it is no such thing. There is no condition in it; it is a contingent limitation. If it is a limitation, it does not defeat the right of the husband to be tenant by the curtesy, though the estate is *spent*.(*x*) It is certainly inconsistent with all ideas entertained in modern practice, to consider an estate orignally limited in fee, and abridged by a subsequent limitation over upon the happening of a particular event, in any such light as that implied by the observation that it was *spent*, upon the happening of that event. Indeed, were not the observations of Lord Mansfield found in a judgment upon a case which, as reported, was indisputably that of a conditional limitation; they would without doubt have been considered as establishing the general distinction, as to dower and curtesy, between estates expiring by their natural and regular limitation, and estates abridged or defeated by some collateral term annexed to their creation. So far as the language of *the judgment is [*179] to be relied on, it would seem to proceed upon the very distinction which Buckworth and Thirkell is daily cited to overturn.

The decision itself has never been cordially acquiesced in. We are informed by Lord Alvanley, that "it occasioned some noise in the profession at the time it was decided;"(*y*) and though, in delivering his judgment in Doe v. Hutton, his Lordship studiously avoided implicating that decision with Buckworth v. Thirkell, which had been urged at the bar, it is easy to perceive, that his forbearance was owing to that reluctance which the judges so laudably feel to disturb decided cases, where the questions before them can be disposed of on any other principles. The learned editor of the latter portion of Co. Litt. has devoted a part of one of his valuable notes to animadversions on this case. "By a MS. report of this case (he observes), the ground upon which the court appears to have formed their opinion on it is, an analogy they supposed it to bear to the cases of estates in fee simple conditional, and estates tail; in both of which Dower and curtesy continue after failure of the issues; and in both of which the wife's being seised of a fee, to which the issue might by possibility inherit, entitles the husband to curtesy. Some observations have been offered above(*z*) to show, that

(*x*) 1 Coll. Jur. 336. (*y*) 3 Bos. and P. 653.

(*z*) These observations were to the following effect. "As to estates in fee simple conditional at the common law, and estates tail under the statute *de Donis*, the wife was entitled to her dower, and the husband to his curtesy, out of them, after the failure of the issues in tail. But, it may be observed that though it is now difficult to avoid considering estates in fee simple conditional, in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversion expectant on the failure of those heirs; yet, this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or being such, if they afterwards failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter. This entry, therefore, was not an entry upon the *natural expiration of a previous estate*, but for a condition broken; in which case, as in all others where entry is made for breach of a condition, the right of the wife to her dower, and the husband to his curtesy, if the general rule were adhered to, would be defeated. But, for reasons now rather to be guessed than demonstrated, this case was made an exception from the general rule. So with respect to the right of the wife of tenant in tail to her dower, and the husband to his curtesy, after the failure of the

the continuation of *Dower and curtesy in the cases of estates in fee simple conditional, was an exception to a general rule (Dower and curtesy, in all other cases of conditions, being defeated *by the entry for the condition broken), and that the same reasoning may be applied to the continuation of Dower and curtesy, out of an estate tail, after the failure of issue. It may therefore seem singular that the court, on this occasion, should prefer reasoning by way of analogy from the only admitted *exception* to the general rule, to reasoning by analogy from the general rule itself. It is the more singular, as the general case of estates on condition approached nearer to the case then under the consideration of the court, than the particular case of estates in fee simple conditional, or estates tail, for the distinguishing feature of the devise which gave rise to the case before the court (as of all devises of that description), is, that after the whole fee is first devised, it is made defeasible by a subsequent clause. Now, neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it, but this quality forms the very essence of all other estates upon condition. With respect to the application of the maxim that where the issue may by possibility inherit, the husband shall have his curtesy (and so *vice versâ* of Dower); in every place in the books where that is mentioned, it is to introduce an enquiry whether the wife, being in the actual seisin of an estate, was in fact seised of an estate, the *quality* of which was such, that the issue of the husband might inherit it, but never with a view to show that the *quantity* of the estate was such that it might endure so long as to be inheritable by the issue. On the contrary, when the wife's estate is evicted by title paramount, or by an entry *for the breach of a condition, in both cases the issue might have inherited; but the husband would be entitled to his curtesy in neither after the eviction or entry. Another difference between the case of an estate in fee simple made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation or devise, cannot, by any means whatever, be discharged by the first taker, or devisee, from the operation of the subsequent limitation or devise, but an estate in fee simple conditional may immediately after the birth of a child, and an estate tail immediately after marriage, be destroyed, and a fee simple absolutely acquired, by the husband and wife joining in a fine or common recovery. The case is the same with respect to the wife's right of Dower. Besides, the quality we are speaking of is not sufficient of itself to entitle the husband to curtesy or

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issues in tail; the statute *de Donis* introduced no new estate, but only preserved estates limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them, and as they preserved the estates, so they preserved the incidents belonging to them, and among others, the right of the wife to her dower, and the husband to his curtesy." Butl. Co. Litt. 241. *a*. note (4.) It may, however, be doubtful, whether the right of the donor to re-enter upon an eventual failure of issue, after the condition had been once performed by the birth of issue, did not arise rather from a determinable quality annexed to the estate (as a fee, as long as the donee should have heirs of his body,) than from the operation of an implied condition. And see Preston on Estates, chap. on Conditional Fees. If so, the case of dower of a gift to a man and the heirs of his body, at the common law, after failure of the issue, would seem to be an exception to the rule as to collateral limitations, rather than as to conditions.

the wife to Dower; it is only one of many incidents which the estate ought to have to give that title."(*a*) To these observations may be added, that Mr. Sugden, in his valuable Treatise on Powers,(*b*) has intimated his opinion that the case of Buckworth v. Thirkell was not rightly decided. Such appears to have been formerly the opinion of another conveyancer of great eminence. In the later writings, however, of that gentlemen, there appears to be an inclination to adopt the law of that case, and in one passage it is remarked, that "the cases of Dower of estates determined by executory devise and springing use, owe their
[*183] existence to the circumstance *that these limitations are not governed by common law principles; and when the limitation over was allowed to be valid against the former donee, it was on the terms that the limitation over should not impeach the title of Dower of the wife of that donee."(*c*) The writer has not hitherto been so fortunate as to meet with the passages in the books from which this proposition is collected. The case of Flavill v. Ventrice, already noticed, proves that at that period two of the judges entertained a different opinion, and upon what the doubt of the dissentient part of the court turned does not appear. The language of the court, too, in the earlier case of Sammes v. Payne, assigning as a reason that the husband should be tenant by the curtesy, that the estate tail of the wife was "*spent and determined* by the dying without issue, and *doth not cease*, or is *cut off* by any limitation," if it mean any thing, must imply, that in the latter case, the court thought it might have been otherwise. The term *limitation* must here necessarily signify some qualification annexed to the creation of the estate, operating in derogation or abridgment of the time comprised in that estate, and it is peculiarly the property of a conditional limitation to *cut off*, or produce a *cesser* of, the estate upon which it operates.

It has been usual to represent the cases of Dower of an expired estate tail, and of a fee simple conditional at common law, after failure of the issues, as exceptions to the rule *cessante statu primitivo, cessat atque*
[*184] *derivativus*, and to give some colour to the *decision in Buckworth v. Thirkell, it has been frequently said, that that case is no more than an additional instance of exception. This is a protection which the writer doubts whether it is correctly entitled to. The language of the resolutions in Paine's case seems to put the point upon another ground, and to show, that the former instances are erroneously alleged as exceptions to the rule *cessante statu*, &c. "At the common law (said the court), if lands had been given to a woman, and the heirs of her body, and she had taken a husband, and had issue, and the issue died, and the wife also without issue, whereby the inheritance of the land did *revert* to the donor, in that case the estate of *the wife* is determined, and yet the husband shall be tenant by the curtesy, for that is *tacitè* implied in the gift."(*d*) So, "if tenant in tail takes a husband, and hath issue and dies, now the husband is tenant by the curtesy; and although afterwards the issue dies without issue, so that the estate tail is determined, yet his estate shall continue, for it is not derived merely out of the estate of the wife, but is created by the law, by privilege and

(*a*) Butl. Co. Litt. 241 *a*. n. (4.)
(*b*) P. 333. n. (II.)
(*c*) 3 Prest. on Abst. 373.
(*d*) 8 Co. 68.

benefit of law *tacitè* annexed to the gift."(*e*) These passages seem to prove, that though for *all other purposes*, the estate tail, &c. is determined, yet for the purposes of a title to be tenant by the curtesy, or tenant in Dower, the estate still continues in intendment of law, the dowress, &c. although not expressly included by *name*, as the heirs are, in the language of the gift, being considered as tacitly included in that gift, and her *estate as a portion of the time comprehended in the terms of the limitation, or, as Coke expresses it in another place, "*quodammodo*, a continuance of part of the estate tail."(*f*) So long then, as any portion of the original estate is subsisting, the rule *cessante statu primitivo, cessat derivativus*, cannot apply, and the cases of Dower and Curtesy would seem to be improperly propounded as exceptions to it. This point also, it is important to remark, is not, as has been usually represented, peculiar to estates tail, and estates in fee conditional, but, as has been already shown, equally applies to estates in fee simple, determining by escheat for default of heirs. In all these cases, then, the estate of the dowress may continue, not upon any special exemption from the application of the rule *cessante statu*, &c.; but, because, although there are no heirs, issue, &c. the limitation has not yet finally operated, nor can operate till her death, to determine the quantum of enjoyment originally designated. So long as there are heirs, the estate continues *in toto;* so long as there is a dowress, the estate has a partial continuation. On the other hand, a conditional limitation takes effect, without any respect to the amount of enjoyment comprehended in the original limitation of the estate to which it is annexed. Although there *are* heirs answerable to the given description, the existence of those heirs no longer ensures the continuance of the estate; and it may be made a question why that portion of the time of enjoyment which is tacitly implied by the original *limitation, is in a better situation than that other portion of it which is expressly designated by the terms of the grant.

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These observations, whatever their value, will be received by the student with caution. Until the law of Buckworth v. Thirkell (if it *be* a decision for the point understood), shall be reconsidered before a competent jurisdiction, it cannot be considered in practice but that a title of Dower *does* exist under the given circumstances, and the remarks of the writer, although not standing alone, can have no other influence than as they may tend to show that there is a possibility that that decision may not be followed.

The point here discussed is of the more importance to be correctly understood, since it goes to the extent of governing, in a great measure, a question of frequent discussion in practice, which has never yet been decided, and upon which much difference of opinion exists. This question arises upon a form of limitation occasionally met with in modern deeds, and in most cases adopted for the express purpose of defeating a title of Dower; namely, a limitation to such uses as A. shall appoint, and in default of appointment, to the use of himself in fee.

This mode of limitation was adopted under the impression, that as the appointee came in as if named in the deed creating the power, he was in paramount the right of Dower in the wife, and consequently held

(*e*) 8 Co. 71. (*f*) 7 Co. 73.

the estate discharged of the Dower. The following remarks, in Mr. Sugden's treatise on Powers, will open the law on this point. "As to [*187] *powers with estates limited in default of their being exercised; immediately upon the execution of such a power, the estates limited in default of appointment cease, and are defeated, and the estates limited under the power take effect from the time of the execution of the power, in the same manner as if they had been contained in the deed creating the power. The estates however, limited in default of appointment, are, as we have seen, vested estates. Therefore, where an estate is limited to such uses as a man shall appoint, and in default of appointment to him in fee, as he is seised in fee until appointment, his wife becomes dowable; and it has been doubted, whether a subsequent appointment will drive out the wife's right of Dower.(*g*) It is to prevent this question from arising, that in the limitations to bar Dower an interposed estate is given in default of appointment to a trustee. But we must now inquire whether the doubt is founded. There are few points upon which a greater difference of opinion has prevailed in the profession. It was formerly much debated whether the fee was vested in the party, but that question is now at rest. Some opinions have taken a distinction between a limitation in default of and *until* appointment, and a limitation merely in default of appointment; in which last case, it has been contended, the fee does not vest; this doctrine, however, cannot be supported at the present day. It must be taken as a settled principle, that the fee is vested in the husband, and the right of Dower [*188] has attached. And the opinion *of most of the eminent men of the times, and amongst them of the late Mr. Fearne, was, that the right of Dower was defeated with the estate on which it attached by the execution of the power. The opinions of the judges stand thus. In Cave v. Holford, Mr. Justice Heath expressed an opinion, that the power would enable the donee to bar the claim of Dower.(*h*) In Cox v. Chamberlain,(*i*) Lord Alvanley spoke rather dubiously of the question. He said, that by the execution of the power, the estate in fee might be superseded, "though perhaps not to bar Dower." Lord Eldon appears to have thought with Mr. Justice Heath that the appointment drove out all intermediate estates, and the dowress could not sustain her claim of Dower upon the new estate in the appointee of the power.(*k*) However, it has never been necessary to decide this point;(*l*) and in the last case, Lord Eldon said, that notwithstanding his own opinion, if the point had arisen, he would have permitted the party to take the opinion of a court of law upon it.

"Upon principle, it is difficult to frame a reason in favour of the right of Dower; for, although the estates limited by the execution of the power take effect only from the time of the execution of the power, yet [*189] the estates limited in default of appointment *cease the instant before the new uses arise.(*m*) Perhaps, the doubt may

(*g*) See n. (2.); Co Litt. 216. *a*.
(*h*) "See 3 Ves. J. 657." (*i*) 4 Ves. 637.
(*k*) "See Maundrell v. Maundrell, 10 Ves. 267."
(*l*) "The case of Wilde v. Fort, 4 Taunt. 334, may be treated as an authority in favour of the right of dower. but it is not stated whether Halliday executed his power, or conveyed his estate. If the latter, of course the point did not arise."
(*m*) "The doubt could scarcely be supported on Buckworth v. Thirkell, Coll. Jurid. 332; 3 Bos. and Pull. 652. n. even if that case itself had been rightly decided."

have been raised on this ground, that as a conveyance of the fee would, in fact, destroy the power, a partial charge or right attaching on it even by operation of law must have the effect of defeating the operation of the power *pro tanto*. And this, it is apprehended, is the principle: for it has never been contended, that where a general power of appointment is given to A., with a limitation in default of appointment to B. in fee, the right of Dower of B's wife would not be defeated by the execution of the power."(*n*)

It appears to the writer that the decision in Buckworth v. Thirkell (if that decision should be followed,) is more relevant to the question now under consideration, than seems to be admitted by Mr. Sugden. It is admitted, that estates created under powers of appointment take effect, in point of title, as if inserted in the deed creating the power, and therefore when, in the case in question, the power has been exercised, it comes to the same thing as if the fee had been originally limited to the donee of the power, with a limitation over by way of springing use to the person taking under the exercise of the power. If the law is once admitted to be that the title of Dower continues notwithstanding the estate to which it was annexed is defeated by springing use, it is useless to remark that the execution of the power "drives out all intermediate estates, *and is prior and paramount to them;"(*o*) for this operation may be fully admitted, and yet the title of Dower [*190] supported; and without reference to the principle suggested by Mr. Sugden, in the concluding passage of his observations. Lord Eldon's remarks upon the point, in Maundrell v. Maundrell, can hardly be considered as conclusive, until it is understood whether his Lordship intended to express an opinion hostile to the law of Buckworth v. Thirkell, or whether the law of that case, in its application to estates defeated by the execution of a power, escaped his consideration.

No case has occurred, to the writer's knowledge, in which this point has been again considered. At the present time, however, the prevailing and almost universal practice is not only to make the vendor execute his power, but to require him and his wife to levy a fine at the vendor's expense; and till this case can be distinguished on principle from the case of a fee defeated by executory devise or shifting use, or the law of Buckworth v. Thirkell shall be solemnly overruled, the practice is certainly right.

*CHAPTER IX. [*191]

Of the means by which A TITLE OF DOWER *may be* EXTINGUISHED, DISCHARGED, *or* SUSPENDED, *by the act of the party.*

IT is an important quality in titles of Dower, and, indeed the the circumstance which makes them matter of so anxious consideration in modern conveyancing, that after they have once attached, they cannot be extinguished or suspended by any act of the husband alone, in the nature of alienation or charge. The law, in its anxiety for the preserva-

(*n*) Sugd. Pow. 331, et seq. (*o*) 10 Ves. 266.

tion of this favourite provision, put it absolutely out of the power of the husband to deprive his wife of it without her concurrence solemnly manifested by matter of record.(*a*)

These circumstances of preservative caution, warring against the wants and conveniences, of mankind, in a country where property is incessantly changing hands, and where the ingenuity of lawyers seldom fails to keep pace with the requisitions of the times, have eventually issued in the virtual abolition, in *the great majority of cases, of the very provision which they were intended to protect.(*b*)

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It was for a long time doubted by great lawyers, whether, before the death of the husband, there were any means by which the wife's inchoate title of Dower might be voluntarily extinguished. It was thought that as she had no right of action until the death of the husband, she had nothing to part with till then, and could not be bound even by fine.(*c*)

But it is now clearly established, that the title of Dower, although inchoate till the death of the husband, yet being an interest attached on the lands from the instant of the concurrence of marriage and seisin, is extinguishable by those modes by which a married woman may relinquish any other legal interest, and even so long since as the time of Lord Coke, we are told that "no question was made but that if the husband and wife levy a fine, the wife is barred of her Dower, for the intermarriage and seisin are the fundamental causes of Dower, and the death of the husband but as an execution thereof."(*d*)

If an action was brought against a husband and wife for the recovery of lands wherein the wife had any estate, and judgment was given against them, the wife was barred;(*e*) and at an early period it seems to have been admitted, that a recovery against the husband and wife of the husband's lands, should bar the wife's title of Dower.(*f*) And a fine being an accommodation of a suit, and a concord being deemed to have the same force and effect as a judgment in a real action, it follows, that a married *woman must have been as effectually bound by a fine, as by a judgment in an adversary suit.(*g*)

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In Eare v. Snow,(*h*) a husband who was tenant in tail, suffered a recovery, in which he, and his wife, who had nothing in the land, were named as joint tenants, and the wife appeared as joint tenant, and vouched, and she surviving her husband, it was contended that she should have the recovery in value, by conclusion, and consequently that the issue were not barred. But the court held, that the recovery in value should not go to the wife, for that she lost nothing, and that the recovery in value shall go to him who hath lost the tenancy, and shall be of the like estate which he lost, and that they "ought to adjudge that she who had no estate in the land recovered shall have no estate in the land recovered in value, but that she was named in the præcipe only to

(*a*) There are two instances in Madox's *Formulare Anglicanum* (No. 148. 319,) of feoffments which are expressed to be made with the assent of the feoffor's wife. And Mr. Reeves (Hist. Eng. Law, vol. i. p. 91.), supposes, that the wife's claim of dower might in those days be barred by such assent, because feoffments were then made publicly in court. See Butl. Co. Litt. 330. *b.* n. (1.)

(*b*) See chap. v.
(*c*) See 10 Co. 49.
(*d*) 10 Co. 49. *b.*
(*e*) 2 Inst. 342.
(*f*) Plow. 514; Shep. T. 46.
(*g*) See Hargr. Co. Litt. 121. *a.* n. (1.)
(*h*) Plow. 504.

be barred of her Dower, to which purpose women are commonly named in common recoveries had against their husbands, and the common usage in this case is to be regarded, for in such cases, it has always been the intent of the parties before this time, that the wife shall be barred of her Dower, and the estate tail should be barred also."

In this case, the præcipe was brought against the husband and wife jointly; and they did not, as in modern practice, come in as vouchees. The principle upon which a woman was considered as barred of her Dower by such a recovery, would seem to be that the recovery had disaffirmed her husband's title, *and she by being [*194] a party, was estopped to falsify the recovery.(*i*)

At this day, the practice is almost invariably for the husband and wife to come in as vouchees, and it is universally admitted, that the voucher of the wife will extinguish her title of Dower.

The statute *de modo levandi fines*(*k*) has prescribed, that where married women are parties to fines, they shall first be examined by the justices, to ascertain their consent; and this private examination is used as well where the woman joins in a fine to extinguish her Dower, as where it is levied as a conveyance of her estate. And although fines only are mentioned in the statute, yet it was the usage in Lord Coke's time, when a common recovery was suffered by husband and wife, to examine the wife, and to grant a *dedimus potestatem*, to take her acknowledgment upon examination, as in case of a fine.(*l*) Pigott, in his Treatise on Recoveries,(*m*) remarks, that this practice is wholly disused in common recoveries; but his editor, Serjeant Wilson, observes that this is a mistake, and that the serjeants at the bar now examine feme coverts when they come to suffer recoveries.

In modern practice, a fine is uniformly used for the purpose of barring the wife's title of Dower, except in cases where a recovery is necessary to discharge the title from an existing estate tail. In cases of vendor and purchaser, the fine must of *course be at [*195] the expense of the vendor, as necessary to discharge his title from the existing incumbrance.(*n*)

Proclamations are not necessary upon a fine levied for the purpose of extinguishing a title of Dower only, but the modern practice is to proclaim every fine.

By the custom of particular places, a married woman may be barred of her Dower by a customary alienation, without fine or recovery.

Thus, in London, a deed of bargain and sale by husband and wife, acknowledged before the Lord Mayor, or the Recorder and one Alderman, and upon which the wife is separately examined, and proclaimed and enrolled in the Husting's Court, shall bind as a fine at the common law.(*o*)

And a recovery by writ of right in the Husting's Court of London, is as effectual to bind the right of a feme covert by the custom of London, as a fine at common law.(*p*)

(*i*) See Pig. on Recov. 67.
(*k*) 18 E. 1; 2 Inst. 515.
(*l*) 10 Co. 43.
(*m*) P. 66; and so also is 5 Mod. 210.
(*n*) See an opinion of Mr. Booth's on this point, in 1 Williams' Prec. 72.
(*o*) Hughes' Writs (cites 29 H. 8 M. 5 E. 47 p. 1. Suits Enrolled, 10, 14, 15); Bohun Priv. Lond. Emerson, 26.
(*p*) Dy. 290. *a*.

It is said that by the custom of Winchester, a deed enrolled, is equivalent to a fine at the common law.(*q*)

In treating a fine as an *absolute* bar to a title of Dower, these observations assume that the fine levied by the husband and wife
[*196] is of such a nature *as to import a grant of the fee, or at least of an estate of freehold. Where, however, the fine only creates a particular interest by way of charge, or term for years, it seems that the operation of the fine bars the title of Dower only to the extent, and as against the owner, of the particular interest created; and the old title of Dower still subsists upon the fee, subject to the charge, &c. As if the husband and wife grant a rent-charge, or make a lease, by fine, the wife will recover her Dower of the land, and hold it charged with the rent, or the term.(*r*)

And when a fine is levied by husband and wife, which imports a grant of the fee, and no declaration of the uses of that fine is made, as the use results to the conuzor, the wife necessarily becomes again dowable of that use, and it may be made a question whether this new title of Dower will be defeated by a subsequent declaration of the use.

So, if no declaration of the use is made which puts the freehold out of the husband, as where the fine is levied in confirmation of a demise for years, the wife becomes dowable of the reversion which the husband takes by the resulting or declared use.

This sometimes occurs in practice where a fine *sur conusance de droit come ceo*, &c. has been levied, on a mortgage for years made by the husband, and the use is declared in confirmation of the mortgage, without going further; or subject thereto, to the husband in fee. If the intention, therefore, is that the fine should operate generally to ex-
[*197] tinguish the wife's title of Dower, and not merely to conclude *her as against the mortgagee, to avoid all doubt, it is prudent that the fine should be declared to enure, subject to the mortgage, to the usual uses to prevent Dower. Where this is omitted, upon a subsequent sale by the husband it is sometimes contended that another fine is necessary to extinguish the wife's title of Dower on the reversion, unless the purchaser would be satisfied with taking an assignment of the mortgage term. Where, however, the fine has not been already *declared* to enure to the use of the husband in fee, it seems clear that a declaration of the use of the former fine (subject to the term), to the purchaser in fee, would defeat the title of Dower.

It does not indeed appear ever to have been expressly determined whether a declaration of uses, *subsequent* to the levying of a fine, shall conclude the wife of her title of Dower upon the fee which resulted to the husband in the mean time between the levying of the fine, and the declaration of uses. The old doctrine was that the subsequent declaration of uses ("nothing appearing to the contrary"), took effect, not as creating the uses from that time, but as evidence of prior parol uses, or in other words, of the agreement of the parties that the fine, *at the time it was levied*, should enure to those uses;(*s*) and this affirmation being by deed indented, was held to conclude the heir of the conuzor, though

(*q*) Hughes' Writs, 119 (cites 5 H. 4. 14. p. 1.)
(*r*) Per cur. in Lampet's case, 10 Co. 49. *b*.
(*s*) Downman's case, 9 Co. 7. *b*.

no party to the deed, by estoppel, and it may be supposed that it would have been held equally conclusive on the wife.(*t*)

*This was without doubt the correct way of stating the law previous to the statute of Frauds and Perjuries, but that statute has introduced a difficulty which the statute of 4 Ann. c. 16, has not altogether removed, in application to the title of Dower. [*198]

The statute of Frauds and Perjuries having done away with parol declarations of uses, it became doubtful how effect could be given to subsequent declarations of uses of fines, &c. consistently with the doctrine upon which they had been originally established. The statute of 4 Ann. c. 16, "for the amendment of the law," adverting to the existence of those doubts, enacted,(*u*) "that all declarations, or creations of uses, trusts, or confidences, of any fines or common recoveries of any lands, tenements, or hereditaments, manifested and proved, or which hereafter shall be manifested and proved, by any deed already made, or hereafter to be made, by the party who is by law enabled to declare such uses or trusts, after levying or suffering of any such fines or recoveries, are and shall be as good and effectual in the law, as if the said last mentioned act had not been made."

The object of this clause was, it is sufficiently evident, to place subsequent declarations of uses of fines and recoveries upon the same footing, as to validity, as if the statute of Frauds and Perjuries had not existed; but it does not necessarily follow that to effect that, it virtually repealed the statute of Frauds and Perjuries, as to parol declarations of uses, and re-established the validity of those uses, provided they were evidenced by some subsequent declaration by deed. *On the contrary, the impression in modern practice undoubtedly is, that the use does, in point of fact, actually result to the conuzor in the mean time, and that the subsequent declaration of uses does not take effect as evidence of a prior parol agreement, but as creating the uses *in point of estate*, though not in *point of title*, from the time of executing the declaration. It is consequently considered, that intermediate charges and conveyances take effect out of the ownership acquired by force of the resulting use; while the old judges treated them rather in the light of adverse evidence, setting the matter at large, and sending the persons claiming under the subsequent declaration, to furnish other evidence of the agreement of the parties at the time of the fine levied.(*v*) In this respect, therefore, the law appears to be materially altered; and if the use of the fee results to the conuzor, it may perhaps be asked how the title of Dower which consequently attaches, can be extinguished without another fine, admitting that the subsequent declaration of uses does not suppose a previous parol agreement to the same uses. But whenever there shall be occasion to discuss this doctrine, although there can be little doubt that the courts will decline construing the statute of 4 Ann. as a partial repeal of the statute of Frauds and Perjuries, yet, in order to support subsequent declarations of uses upon any recognised principle, [*199]

(*t*) See Co. Litt. 352. *a. b.* that tenant in dower shall be bound by estoppel. So also she shall have the advantage of an estoppel between her baron and the tenant. Roll. Abr. Estoppel (L.) pl. 1.

(*u*) Sect. 15.

(*v*) See the argument of the court in Downman's case, ut supra; and see 12 Mod. 161, in Jones v. Morley.

they will find it expedient to resort to the technical doctrine of *relation*, and decide, that though the party claiming under the declaration was not *in* in point of *estate* by force *of any parol use arising by agreement at the time of levying the fine, yet in point of *title*, he is in by *relation* to the time of the fine levied, and so as to avoid all mesne titles accruing *by act of law*. In any other point of view, a subsequent declaration of uses would require a consideration either of money or blood to support it.

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In leading the uses of a fine which is intended to have the operation of extinguishing the Dower of the conuzor's wife, it is not *necessary*, though in practice always usual, that the wife should concur. The point appears to have been raised in Haverington's case,(*w*) and the resolution upon it was in these words: "That the wife who had title of Dower in the land is concluded of her right of Dower by the declaration of the uses of the fine by the husband only, which fine is afterwards levied by them jointly; because no contradiction of the woman appears that she doth not agree to the uses which the husband solely by his deed of indenture had declared." Perhaps it was not necessary to resort to this reasoning to decide the point. The case of a woman joining in a fine for the mere purpose of extinguishing her title of Dower, stands quite upon a different footing from that of a woman joining with her husband in levying a fine of her own lands, from which the reasoning was borrowed.(*x*) In the latter instance, *her* agreement, either express or implied, is of the essence of the creation of the uses, which take effect out of *her ownership;* in the former case, the wife has nothing to do with the creation of *the uses*—her instrumentality *is confined to the simple act of extinguishing her incipient title of Dower; and her consent to do that is evidenced, not by her joining in the declaration of the uses, but by her being a party to the fine itself, after personal examination by the judge. It was no otherwise necessary that there should be any declaration of uses at all, for the purpose of completing the effect of the fine to extinguish her title of Dower, than that in the absence of such declaration, the husband would take the fee again by resulting use, and consequently revive her title of Dower. The agreement of the husband alone that the fine should enure to the use of some other person, was fully sufficient to intercept such resulting use, without any concurrence, express or implied, on the part of the wife. The author has been the more free in his remarks on the resolution in Haverington's case, because the doctrine, as set down by the reporter, appears to go towards rendering nugatory all the anxiety bestowed by the common law in superintending the circumstances of consent in the case of a woman under coverture; and to transfer the operative force of that consent from the personal examination in court, to the simple act of executing the deed declaring the uses.

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Where a contract for sale has been entered into by the owner of an estate, of which his wife is dowable, and a fine is to be levied to extinguish the title of Dower, if the husband dies before the fine is completed, the purchaser cannot carry the contract into effect as against the wife, even though she may have joined in acknowledging the fine. This

(*w*) Ow. 6.

(*x*) See Beckwith's case, 2 Co. 57. *a*.

*was determined at a very early period. A man seised in tail, bargained and sold to another in fee, and covenanted [*202] that he and his wife would levy a fine for better assurance; and it was agreed that 30*l.* part of the consideration money, should be paid to the wife upon the conusance of the fine by the husband and wife; and after, the husband and wife acknowledged a fine before a judge on the circuit in the vacation, and the 30*l.* was paid to the wife. The husband died before the term, and thereupon the wife stopped the passing of the fine, and afterwards brought a writ of Dower. The purchaser came into equity to be relieved, but it was resolved that he should have no remedy in equity against the Dower, because it was against a maxim in law that a feme covert should be bound without a fine, and the bill was dismissed accordingly as to the Dower.(*y*)

Until of late years, however, it has been almost uniformly held, that if a husband contracts to sell an estate which is subject to a title of Dower in his wife, or an estate of which he is seised in her right, specific performance would be decreed against *him*, although the wife should refuse to join in levying a fine. In Tothill's Reports, there are several decrees of this nature;(*z*) and in Hall v. Hardy(*a*) (1735,) Sir Joseph Jekyll said, that "there had been a hundred precedents, where, if the husband for a *valuable consideration covenants that the wife [*203] shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it if he does not perform it." That case was a bill for specific performance of an award that the party should convey a piece of land (respecting which there were disputes,) and procure his wife to join in a fine. It does not appear that the wife had any other interest than her Dower. In many other cases the estate itself was the wife's, which certainly made it stronger, but the same decree was made.(*b*)—In the case of Outread v. Round,(*c*) however, Lord Chancellor Cowper observed, that though there may be precedents in some cases where a husband has been decreed to procure his wife to levy a fine, yet it ought to be sparingly done; and the rather as it puts the husband upon compelling the wife to do what the law takes to be done voluntarily and without restraint. In that case the wife had executed the release, and joined in the covenant to levy a fine, and part of the consideration was paid by the plaintiff to the husband; who had taken her before a judge, and had done all he could to procure her to join, but could not; and she said she had executed the deed by compulsion; and the husband offering to refund the purchase money with costs, the court decreed accordingly. In the case of Emery v. Wase,(*d*) Lord Alvanley, and afterwards *Lord [*204] Eldon upon appeal, availed themselves of some dissatisfactory circumstances attending the contract, to refuse decreeing specific performance against a husband of his wife's lands, although it was not

(*y*) Hody v. Lunn, 1 Roll. Abr. 375; and see 1 Eq. Ab. 62. pl. 2. side note, correcting the *dictum* in Baker v. Child, 2 Vern. 61; see also 1 Atk. 617.

(*z*) Haddon's case, Toth. 205; Griffin v. Taylor, Ib. 106; Barly v. Herenden, Ib. 156; Sands v. Tomlinson, Ib. 157.

(*a*) 3 P. W. 187.

(*b*) See Barrington v. Horn, 5 Vin. Abr. 547, pl. 35. 2 Eq. Ab. 17. Berry v. Wade Finch. 180. Morris v. Stephenson. 7 Ves. 474. Withers v. Pinchard, Ib. 475, cited.

(*c*) 4 Vin. Abr. 203, pl. 4. (*d*) 5 Ves. 846. 8 Ves. 505.

alleged that there was any difficulty in procuring the wife to join; and the latter expressly sanctioned his decree by the principle of Lord Cowper, that if a married woman is to be effected by the covenant of her husband, the court ought to act sparingly upon that. In a still later case in the Court of Common Pleas,(*e*) where an action was brought on a covenant by a husband that his wife should levy a fine, which he could not prevail upon her to do, Lord Chief Justice Mansfield observed incidentally, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce. And he added that nothing could be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued, and thrown into jail, when the general principle of law is, that a married woman shall not be compelled to levy a fine. This dictum certainly puts the doctrine much higher than the printed cases would authorise, if it referred to nothing beyond them for its foundation. But, as Mr. Sugden has remarked, this observation of Chief Justice Mansfield must have considerable influence on this subject.(*f*) If however the doctrine was to be extended to cases where the wife is merely entitled to *her Dower, the consequences would be terrific. As it was strongly put in argument in Emery v. Wase by the same learned person when at the bar, "if this doctrine is to prevail, the consequence will be that a husband never can be bound by his contract to sell either his own or wife's estate; for he never can make a title except subject to Dower."—"Solemn contracts would be evaded by collusion between the husband and wife. In order to get rid of his contract, he would prevail upon her not to consent."(*g*) So also in Morris v. Stephenson,(*h*) Lord Alvanley, after remarking that there the wife executed the deed, and even in the very covenant it was declared that it was entered into by the husband with her consent, added, "In such a case it is too much to say there shall not be a specific performance. It would be to say that merely because he is a husband, he is to be exempted from performing his covenant; for *non constat* that there is any difficulty in obtaining her consent. I should therefore be obliged to go the length of saying that merely because he is married, he shall not be compelled to perform his covenants." It must not be omitted, however, that in Emery v. Wase, Lord Eldon, in answer to Sir James Mansfield's argument, observed, "If this was perfectly *res integra*, I should hesitate long, before I should say the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that may be afterwards practised to procure it. I should have hesitated *long in following up that presumption, rather than the principle of the policy of the law; for if a man chooses to contract for the estate of a married woman, or an estate subject to Dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who according to law cannot part with her property but by her own free will, expressed at the time of that act of record, takes advantage of the *locus*

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(*e*) Davis v. Jones, 1 Bos. and P. New Rep. 269, and see Howell v. George, 1 Madd. 1.
(*f*) Sugd. Vend. 181, 5th ed. (*g*) 8 Ves. 513.
(*h*) 7 Ves. 479.

pœnitentiæ; and why is he not to take his chance of damages against the husband?" His Lordship, however, added, "If the cases *have* determined this question so, that no consideration of the absurdity that must arise, and the almost ridiculous state in which this court must in many instances be placed, can prevail against their authority, it must be so."(*i*) It had however been previously remarked by the Chancellor that "the argument showed that the point was not quite so well settled as it had been understood to be." But that Sir James Mansfield's dictum was not borne out by the existing impression of the Court of Chancery may perhaps be gathered from an observation of Lord Eldon's in the subsequent case of Innes v. Jackson,(*k*) where his Lordship remarked that if the mortgagee's title would not have been good without a fine, upon the principle of a certain class of cases, perhaps the Court would have decreed the husband to procure his wife to join in levying a fine.

It has been already propounded that a fine is not *necessarily an absolute bar to a title of Dower, but that a woman [*207] may still continue dowable notwithstanding her having joined in levying a fine, either, first, where that fine in its own nature only created a charge, or chattel interest, or 2dly, where, although the fine itself imported a grant of the fee, the use of that fine either resulted to, or was declared in favour of the husband, subject only to the charge, &c. This the writer apprehends to be the correct mode of stating the doctrine of courts of law; but it seems to be the understanding of the profession that courts of equity carry the point still further in favour of the dowress; and that cases may occur where a fine, although an *absolute* bar at law, would in equity, upon the ground of its having been levied for a particular purpose only, be restrained from operating to exclude the widow form her Dower, except to the extent of the particular purpose originally contemplated. It is difficult to glean with precision the circumstances under which this equitable relief would be dispensed. In a case shortly stated from a MS. report in 2 Eq. Abr. 385,(*l*) it is said "A wife joined with the husband in a fine, in order to make a mortgage, which afterwards was not made; the husband died; and the wife brought a writ of Dower, and got judgment by default; and the heir could not be relieved against it *here*, [in Equity] as he would have been if the fine had been a bar of her Dower in equity as it was at law." The court must therefore in effect have decided that the fine was no bar in equity, the particular purpose *having failed. It seems however to [*208] have escaped observation, that as no mortgage was made, the use resulted to the husband, and consequently the fine was no more a bar at law than it was in equity.

In Naylor v. Baldwin(*m*) (15 Car. I.) Richard Baldwin made a mortgage by demise to Tirril for securing 400*l.* lent by Tirril, and to confirm the mortgage, Baldwin and his wife acknowledged a fine to Tirril. On a bill in equity for divers matters, the Court is reported to have said, "as for Mrs. Baldwin's Dower, unless she have barred herself totally by levying the fine, the Court makes no order therein at present, but

(*i*) 8 Ves. 515.
(*k*) 16 Ves. 367.
(*l*) And see S. C. cited Pr. Ch. 34, as Mrs. Danby's case.
(*m*) 1 Ch. Rep. 130.

declared that if she levied the fine only to secure the lease [mortgage,] no debt could bar her except Tirril's debt on the lease." It is impossible to glean any thing from a case so vaguely reported. It does not even appear whether the fine was or not an absolute bar at law, but the concluding observation of the court certainly seems to address itself more to the *intention* than to the technical operation of the fine.

In the case of Jackson v. Parker(*n*) Sir Thomas Sewell laid hold of the circumstance of the equity of redemption being limited to the husband and wife jointly, to infer an intention that the wife should in equity retain her right to Dower, subject to the mortgage debt. In that case John Jackson, tenant in tail of the lands in question, made a mortgage by lease and release and fine, in which his wife joined, to Frances Stubbs, and in which there was contained a proviso that if the said John [*209] Jackson *and Esther *his wife*, their heirs, executors, administrators, or assigns, should pay the mortgage money and interest, then Frances Stubbs, her heirs, or assigns, should reconvey the premises to the said John Jackson and Esther *his wife*, their heirs or assigns; and there was a clause at the end of the deed which declared the uses of the fine to be (subject to payment of 300*l.* and interest) to John Jackson, his heirs and assigns. Upon a question as to what interest the wife took in the equity of redemption on this mortgage, Sir Thomas Sewell was of opinion that notwithstanding the language of the proviso, there was no room to presume any contract between the husband and wife, by which the latter was to take a joint interest in the equity of redemption in lieu of her Dower, but that, if it had been so, it would have been recited in the deed. But he added, "the wife had a right to redeem, and if she had redeemed, a court of equity would not have taken the estate from her, but upon the terms of allowing her Dower."(*o*)

In a previous case of Dolin v. Coltman(*p*) (1684), which was not adverted to in arguing Jackson v. Parker, the doctrine seems to have been carried to a still greater length. There was an express agreement that the wife should have the equity of redemption, but that agreement failing upon a special ground, it was held that the wife should be restored to her Dower. The case is thus stated:

[*210] The wife joins with her husband in a mortgage, *and levies a fine to the intent to bar her Dower, and in consideration thereof the husband agrees the wife shall have the redemption of the mortgage; and the husband afterwards mortgages this estate twice more. The court took this agreement to be fraudulent as against the subsequent mortgagees, so far as to entitle the wife to the whole equity of redemption: but in regard the wife in confidence of this agreement had levied the fine, and thereby barred her Dower, and the husband and wife being living, the court decreed that after the husband's decease, the wife in case she should happen to survive him should enjoy her Dower."

This case appears to have been decided upon a principle which is not much favoured at this day, namely that of giving relief against a contract executed, by reason of failure of the consideration. It seems

(*n*) Ambl. 687.
(*o*) See also Southcoat v. Manory, Cro. Eliz. 744.
(*p*) 1 Vern. 294.

however to be the result of these cases of Dolin v. Coltman and Jackson v. Parker, if they can be relied upon as law, that where a married woman joins in a fine of her husband's estate to a mortgagee in fee, and the equity of redemption is in terms limited to the wife, if this limitation fails of effect as a settlement of the equity of redemption, either by reason that the deed furnishes no evidence of a contract between the husband and wife for a transfer thereof to her,(*q*) or by reason of third persons subsequently obtaining a legal priority against her as a volunteer, a court of equity will take advantage of the right of redemption limited to her, to restore her to her Dower. With regard to the *case of Dolin v. Coltman, however, it should be observed [*211] that it seems to have been the impression of the Court of King's Bench in Lavender v. Blackstone,(*r*) and of Lord Eldon in Pulvertoft v. Pulvertoft,(*s*) that the wife's joining in barring her Dower will be a sufficient consideration for a settlement on her. This, it is observed by Mr. Sugden, is the better opinion. He adds; "it has been decided that the wife parting with her jointure is a sufficient consideration. Now if that which comes in lieu of Dower is a valuable consideration, surely the Dower itself must be equally valuable. Besides, where a woman is entitled to Dower, the estate cannot be sold to advantage without her concurrence; she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her."(*t*) In a late treatise it is remarked that "from the case of Dolin v. Coltman it may, perhaps, be thought, that parting with a right of Dower, will *not* be sufficient. The case, however, is but shortly reported, and the reasons for the decision do not clearly appear. The reason, most probably, was, that the settlement was more than a reasonable equivalent for the interest the wife had parted with:(*u*) and if so, the case of Dolin *v. Coltman in no wise affects [*212] the position that parting with a right of Dower will support a settlement after marriage. There certainly appears to be as much reason why it should, as that releasing a jointure should do so. Both are equally contingent interests; and yet we find it has been held, in several cases, *that releasing a jointure*, will support a settlement after marriage."(*v*)

Whether at the present day courts of equity would admit of extrinsic evidence that it was the agreement or intention of the parties that the fine should only conclude the wife as against the incumbrancer, or whether they would render such evidence unnecessary by presuming an agreement to that effect in every case where a fine is levied as part of a mortgage transaction, is perhaps doubtful. In Naylor and Baldwin, the court appears to have considered it as a matter of inquiry, and not of presumption; and Jackson and Parker was decided on the language of the deed, as constructively evidencing the intention. Both these cases therefore seem hostile to the doctrine of presumption.

(*q*) Upon this point see Innes v. Jackson, 16 Ves. 356.
(*r*) 2 Lev. 146. (*s*) 18 Ves. 93.
(*t*) Sugd. Vend. 562.
(*u*) Mr. Sugden seems to take the same view of the case, as he cites it as an authority for the proposition that "if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity, in favour of subsequent purchasers, will restrain her to her dower." Sugden on Vendors, p. 562.
(*v*) Atherley on Settlements, 162.

On this point the student should consider the cases where a fine by husband and wife of the wife's jointure lands has been restrained in equity to the particular purposes.(*w*)

After the death of the husband, the title of Dower may of course be extinguished by release to the terre-tenant. And if the husband makes a *lease for life, and dies, and the wife releases her Dower to him in the reversion, this is a good release.(*x*) But Dower will not be extinguished by release of "all actions real" only, unless the releasee has the freehold, so as to be tenant to the præcipe.(*y*) To any other person than the freeholder, it is of absolute necessity that the widow should release her *right;* and in practice, she should do so in every case.

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If the widow marries again, a fine is of course the only efficient mode by which she can release her title of Dower, during the continuance of her coverture.

Before leaving this subject it should be remarked that the consequence of a valid assignment of Dower is that the *title* of Dower, which, on the death of the husband, attached upon *all* the lands of which he was seised during the coverture, is discharged as to all the remaining lands, if the assignment was made in allowance of *all* the lands, or as to the remaining parts of the particular lands which the assignment, if partial only, was made in allowance of. The heir or grantee may therefore make a good title to the remaining lands, or parts of lands, without the concurrence of the dowress; for if she was to bring a writ of Dower against the owner of these lands, the assignment might be pleaded in bar to the action. The reader is requested to pursue this subject, with *its distinctions, in the chapter treating on Assignments of Dower.

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It remains to be observed that some acts of the widow may amount to a waiver, and others to a suspension, of her right to an assignment of Dower.

Thus "if a man seised of Blackacre in fee, take wife, and dieth, and the wife accept a lease for life of Blackacre, she cannot demand Dower of the same acre, for that she cannot demand it against herself.(*z*)

So where the widow accepts a *chattel interest* in the lands of which she is dowable, her right to be endowed is held to be suspended during the continuance of the chattel interest. As where, after the death of the husband, the widow accepts a lease for years of the husband's land from the heir, during this lease, her Dower is suspended.(*a*) So accordingly where, before the abolition of wardships, the king seised the wardship of the heir *in capite*, and afterwards the king by patent committed the guardianship of all the lands of the heir to the widow, during the nonage, and no mention was made of the Dower of the widow, nor any

(*w*) See Solly v. Whitfield, Finch, 277. Anon. Skin. 238. Southcoat v. Manory, Cro. Eliz. 744.

(*x*) Shep. T. 328. 8 Co. 301.

(*y*) Altham's case, 8 Co. 301.

(*z*) Perk. sec. 350, (cites M. 2 H. 4. 7.) So if the demandant in a writ of dower makes an illegal entry into the land of which she claims dower, or into any part of it, she thereby abates her writ. Kettillesby v. Kettillesby. Dy. 76, *b.* But it seems that in *scire facias* to have execution of dower recovered, such an entry has been held no plea. Ib.

(*a*) Jenk. Cent. 2. ca. 38. F. N. B. 149 (E.) (cites 2 H. 4. 7.)

exception of it, and afterwards the sued for her Dower in the Chancery, *she was held barred of her Dower during [*215] the nonage, for her Dower and such a patent are inconsistent.(b)

But "if a man seised in fee of White-acre, lease the same acre unto a sole woman for forty years, and the lessor intermarrieth with the lessee, and the husband suffer the term to continue as it was without any alienation, or other thing done therewith, and dieth within the term, it is said that in this case the wife may have her Dower presently, notwithstanding that the term does continue; because that at the time of the lease she was not entitled to Dower: and notwithstanding that the term doth continue, it shall not cast her of her Dower, because if it [viz. her taking her Dower] shall be prejudicial to any person, it shall be unto the prejudice of the wife herself."(c)

It is also said that if the husband is attainted, and dies, and the feme takes a lease for years, of the king's grant, of his lands, and afterwards by act of parliament, or by reversal of judgment (the heir of the husband being in the king's ward, for that the tenements were intailed) now she shall have her Dower, because it was before her title of Dower *commenced, or rather during its suspension, that [*216] she accepted the lease.(d)

As the husband cannot prejudice his wife as to her freehold, a waiver of Dower by a second husband will not bind the wife after his death. So if the heir, during the coverture with the second husband, makes a lease for years to the wife of the land of which she is dowable, although the husband enters under the lease, she may after his death waive the lease, and claim her Dower.(e) Neither can he prejudice her by accepting less than a third part for her Dower, for after his death she may waive the portion which he accepted, and have her full third part.(f)

*CHAPTER X. [*217]

Of the circumstances under which a TITLE OF DOWER *will be* FORFEITED *by reason of* CRIME, *or* EXCLUDED *by reason of* PERSONAL DISQUALIFICATION.

The forfeiture of a title of Dower by reason of crime may accrue either by the crime of the wife herself, or, as most commonly, by the crime of the husband of whose lands she is dowable.

By the ancient law, the wife of a person attainted of treason or felony

(b) Jenk. Cent. 2. ca. 38. F. N. B. 150. Hughes' Writs (cites M. 2 H. 4. 7.) Bro. Dow. pl. 27, (cites 11 H. 4.)

(c) Perk. sec. 351, (cites H. 6 H. 4. 7.) F. N. B. 149 (E.) n. But see Ow. 154. Arg. in Goodridge v. Warburton, where it is said that if feme sole lessee marries the lessor, and the lessor dies within the term, and the wife enters, this shall not conclude her dower *after the lease is expired;* and cites 11 H. 4. The fact of entry by the wife is, however, not noticed in the case as put by Perkins.

(d) F. N. B. 149, (E.) note. (e) Jenk. Cent. 2. Ca. 38.

(f) 4 H. 5. 32. E. 1. Fitz. Dow. 121. Jenk. Cent. 2. Ca. 56.

could not be endowed,(*a*) to the intent, says Staunforde,(*b*) that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton(*c*) gives it another turn, viz. that it is presumed the wife was privy to her husband's crime.

By the mitigating statute of 1 Ed. VI. c. 12, it was enacted "That albeit any person or persons of what estate, condition, or degree he or they be, shall hereafter fortune to be attainted, convicted, or outlawed of any treason, petit treason, misprision of treason, murder, or felony whatsoever, yet that notwithstanding, every woman that is or shall fortune [*218] *to be wife of the person so attainted, convicted, or outlawed, shall be endowable and enabled to demand, have, and enjoy her Dower in like manner and form as though her husband had not been attainted, convicted, or outlawed; any statute, law, usage, or custom to the contrary in any wise notwithstanding."(*d*) But by the 5 and 6 of the same king, cap. 11, the forfeiture of Dower was partially revived, it being enacted "That the wife or wives whose husband or husbands hereafter shall be attainted of *treasons* specified in this act, or of any other treasons whatsoever they be, shall in no wise be received to ask, challenge, demand, or have Dower of any the lands, tenements, or hereditaments of any the person or persons to be attainted of treason as is aforesaid, during the said attainder in his force."(*e*)

The words of this act being general, exclude the wife as well in cases of petit, as of high treason.(*f*) But in the case of certain modern treasons relating to the coins, the forfeiture of Dower is expressly saved.(*g*) And a feme covert, *non compos*, by killing her husband, would not forfeit her Dower, since she is incapable of committing petit treason or any other crime.(*h*)

[*219] Upon the ground, probably, that the forfeiture of *Dower on attainder was by reason of the disinherison of the issue,(*i*) it is said in Litt. sec. 55, to have been the opinion of Vavisor, that if a man seised of land committed felony, and after aliened, and after was attainted, the wife should have a good action of Dower against the feoffee, although not if it escheated to the king, or to the lord. If this point is law, it might be expected to be applicable to treason at this day, but Lord Coke denies this section to be Littleton's, and adds that "it is clear that the wife at the common law should not have been endowed against the feoffee. For to deter and retain men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony." He then enumerates these punishments, and among then the loss of his wife's Dower, and adds "so as the woman shall lose her Dower as well against the feoffee as against the lord by escheat. And so it was resolved in a writ of Dower brought by Mary Gates, late wife of John Gates, who after the coverture had infeoffed Wiseman in fee, and after committed high treason, and was

(*a*) Perk. sec. 308, 387, (cites 13 E. 1. Dow. 172. M. 15 E. 3. Dow. 68.) Bro. Forf. de terres, pl. 78. F. N. B. 150. Gilb. Uses, 402.
(*b*) P. C. b. 3. c. 3. (*c*) C. 110.
(*d*) Sect. 17. (*e*) Sect. 13.
(*f*) Co. Litt. 37, *a*. 392, *b*. Stanf. Pl. Cor. 195.
(*g*) St. 5 El. c. 11. 18 El. c. 1. 8 and 9 W. 3. c. 26. 15 and 16 G. 2. c. 28.
(*h*) Perk. sec. 365. 3 Bac. Abr. 534. (*i*) See Sav. 54.

thereof attainted, that the wife should not be endowed against the feoffee, and in that case it was resolved that so it was at the common law in case of felony."(*k*) In the report of this case by Dyer, he notes the words of the statute, 5 and 6 Ed. VI. c. 11, "that the wife of any man attainted of any manner of treason whatsoever *shall in *no wise be received to ask, challenge, demand, or have Dower of any of her husband's lands during the force of that attainder.* And yet note the case above, that the lands aliened before the treason committed, were never subject to any forfeiture or escheat, as in the case of Vavisor at the end of the Chapter of Dower in Littleton; and therefore A. Browne, serjeant, was very angry with the above judgment." This judgment however is confirmed by the decision in Maynye's case.(*l*) Maynye, seised of lands in fee, made a feoffment to a stranger, committed treason, and was attainted thereof, and had a charter of pardon and died. It was moved by Plowden in the Exchequer, if the wife of Maynye should have Dower against the feoffee; and per Manwood, C. B. "By reason of this attainder Dower cannot accrue to the wife, for her title begins by the intermarriage, and ought to continue and be consummated by the death of the husband, which cannot be in this case, for the attainder of the husband hath interrupted it, as in the case of elopement, and this attainder is an universal estoppel, and doth not run in privity only betwixt the wife and him to whom the escheat belongs, but every stranger may bar her of her Dower by reason thereof, for by the attainder of the husband the wife is disabled to demand Dower as well as to demand his inheritance; and he cited the resolution of all the justices of England in the case of the Lady Gates, 4 Ma. Dyer, 140."

[*220]

When, however, after the attainder of treason, the husband procures a charter of pardon, his wife will, *it seems, be dowable of all lands of inheritance of which he becomes seised after the charter of pardon, for, as Perkins observes, "notwithstanding that she was his wife at the time of the attainder, yet the issue which the husband might have had by her, after the purchase of his charter of pardon, is inheritable."(*m*)

[*221]

But notwithstanding the charter of pardon, the wife shall not have Dower of the land which he had before the pardon; and even, as it seems, though such land descended to, or was purchased by him mesne between the attainder and the pardon.(*n*) In Maynye's case, before cited, Chief Baron Manwood observed, "the pardon doth not help the matter, for the same extends but to the life of the offender, but doth not take away the attainder, by which she is barred to demand Dower during the said attainder in force."(*o*) This observation, however, if the cases above cited are to be received as law, appears to be too general in its language.

But if the heir reverses the attainder by writ of error, then the wife shall be endowed; and though before the treason committed the baron had levied a fine with proclamations, and five years had passed before the reversal, yet she shall have her Dower; for during the attainder she

(*k*) Co. Litt. 41, *a*. Gate v. Wiseman, Dy. 140, *b*. Benloe and Dal. 55, *a*. S. C.

(*l*) 1 Leon. 3.

(*m*) Perk. sec. 387, and see Bro. Escheat, pl. 27. S. P. as to felony before the Stat 1 Ed. 6. c. 12.

(*n*) Bro. Escheat. pl. 27, as to felony before the Statute.

(*o*) 1 Leon. 3.

could not claim, and she had no means of reversal, and the action and
[*222] *right of Dower accrued to her after reversal of the attainder.(p)

If a woman is herself attainted of treason or felony, she will thereby lose her Dower, but if she is pardoned before the death of the husband, she will be restored to her Dower.(q) In an ancient reading by Philips, it is held that if the wife be attainted, and then the husband purchases land and aliens it again, and then the wife is pardoned, she shall have Dower of that land. And he cited Maunsfield's case, adjudged 28 Elizabeth. In that case a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands and aliened them again, and died: the land which the wife had in jointure was evicted, and the wife had Dower of the land which was purchased and aliened by her husband at the time when she was barred of her action of Dower. So if wife elopes, and husband purchases lands, and aliens them, and then the wife is reconciled, she shall have Dower of those lands.(r) These cases seem to proceed upon the ground that the bar is to the action only, and not to the title.

There are some acts of the wife which amount to so violent a breach
[*223] of the marriage contract, as, of *their own force, to amount to a forfeiture of Dower, by way of penalty.(s) These forfeitures arise by the statute law. By St. 13 Ed. I. c. 34, (commonly called Westm. 2,) it is enacted, *Si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, nisi vir suus sponte, et absque coërcione ecclesiasticâ,(t) eam reconciliet et secum cohabitare permittat.*

Lord Coke, in commenting on this statute, observes on the words *si sponte reliquerit, et abierit et moretur cum adultero*, that although the words of this branch be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, and after consent and remain with the adulterer without being reconciled, she shall lose her Dower; for the cause of the bar of her Dower is not the manner of the going away, but the remaining with the adulterer in avowtry, without reconciliation.(u) He also observes upon the words *moretur cum adultero*, that although she does not continually remain in avowtry with the adulterer, yet if she be with him, and commits adultery, it is a tarrying within the statute: also if she once remains with the adulterer, and
[*224] after he keeps her against her *will; or if the adulterer turns her away, yet she shall be said *morari cum adultero*, within the act.(v)

And if the wife goes away with her husband's agreement and consent with A. B., and after A. B. commits adultery with her, and she remains with him, without reconciliation, she shall be barred of her Dower.(w)

(p) See Menvill's case, 13 Co. 19. Moor 639. S. C. 2 Bulstr. 245. cited.
(q) Co. Litt. 33, *a*. 13 Co. 23, in Menvill's case. Perk. sec. 349.
(r) Hargr. Co. Litt. 33, *a*. n. (8.)
(s) Co. Litt. 32, *a*. (cites Fleta. l. 5. c. 22. Br. c. 109. Mirr. c. 5. sec. 5.) 2 Inst. 433. Perk. sec. 354. 43 E. 3. 19. 19 E. 4. 30. Sydney v. Sydney. P. W. 276.
(t) See 2 Inst. 436. Perk. sec. 354.
(u) 2 Inst. 435. Co. Litt. 32, *b*. 43 E. 3. 19 *b*. Perk. sec. 354. Bro. Dow. pl. 12.
(v) 2 Inst. 436; Co. Litt. 32. *b*.; Perk. sec. 354.
(w) 2 Inst. 436. In Coot v. Berly, Rep. t. Holt. 232; 12 Mod. 232, in dower, the defendant pleaded elopement in the wife, who replied, that her husband had bargained and

But, it seems there must be a going away in some sense, for it is said that if she remain in adultery upon the husband's lands or tenements, she shall have Dower, because the same is not an elopement.(*x*) So, if the lands were of the joint purchase of the husband and wife; "because the husband is to see that none such live within his land;"(*y*) or though the wife live within the house of a free tenant of the manor which is her husband's.(*z*)

And, "if a man seised of two manors in fee, takes a wife, and when the husband is dwelling at one manor, the wife goeth unto the other manor, and when she is there she lives in adultery, it is said that by so doing she shall not lose her Dower, because it cannot be intended a running away from *her husband, when the law cannot intend that she can dwell upon the manor of her husband without the agreement of her husband. *Tamen quære.*"(*a*) [*225]

It was held in Paynell's case, that after elopement there should not be any averment *quod non fuit adulterium*, although the man and woman married after the death of the husband, and produced a sentence of purgation of adultery in the Ecclesiastical Court.(*b*)

To prove a voluntary reconciliation by the husband, Lord Coke says that the cohabitation is not sufficient, without reconciliation made by the husband *sponte;* so as cohabitation only, in the same house with her husband, availeth her not. But in a case in Dyer, cohabitation as man and wife, appears to have been held a sufficient proof of reconciliation.

Thus, where a reconciliation was pleaded, it was given in evidence, that the husband and wife had, after the elopement, lain together divers nights, and in divers places, and demeaned themselves as man and wife. It was objected, that they never lived together in one house, but were apart; and the wife continued in adultery with one or more, during the life-time of the husband: *sed non allocatur*, for there might have been divers elopements, and divers reconciliations; and the defendant ought to take issue on one at his peril.(*c*)

If the friends of the husband esloin him from his wife, so that the wife does not know what is become of him, and the friends of the husband publish that *the husband is dead, and after, they procure the wife to release all marriages and interests which she can have in him as her husband; and after the wife, by the persuasion of the friends of the husband, marries with another, that dies, and she takes another husband to whom notice is given that the first is living, but no notice is given thereof to the wife, though the wife lives in adultery, and though the husband was not out of the realm, or beyond sea, so that the wife ought to take notice that he was living, yet, inasmuch as she *non reliquit virum sponte*, as the statute says, but by the persuasion of the friends of the husband that he was dead, and it does not appear [*226]

sold her to the adulterer, and held bad. See also Paynell's case, Rot. Parl. vol. 1. 146. No. 2; 2 Inst. 435; Hargr. Co. Litt. 32. *a.* n. (10.)

(*x*) F. N. B. 150 (cites 43 E. 2. 19.) Gilb. Dow. 402; Co. Litt. 32. *b.*; 2 Inst. 436. quære.

(*y*) 8 E. 2. Dow. 153, adjudged.

(*z*) Ibid. adjudged; 2 Inst. 436; S. P. contra; though Lord Coke says it has been held otherwise.

(*a*) Perk. sec. 335. (*b*) 2 Inst. 436.

(*c*) Ib. Haworth v. Herbert, Dy. 106. *b.*

that she ever knew that he was living, this is not any such elopement as to bar her of her Dower.(*d*)

It is said by Perkins, "that notwithstanding a woman will not go unto her husband into another country, where he dwelleth not, when he is wounded; and notwithstanding that he dieth of the same wound, she will not bring an appeal of his death, yet she shall be endowed.(*e*) But *quære*, if the husband lie sick in his house, where he and his wife are both dwelling, and his wife will not come to him in his sickness, if she shall have Dower."(*f*)

Another cause of forfeiture is stated by Lord Coke. "If a woman say she is conceived with child by her husband whilst he lived, and in [*227] truth is *not, whereby the next heir is disturbed, she shall lose her Dower, if she acknowledge the same before the justices."(*g*)

By an Irish statute, 6 Ann, a woman by subtle means, or secret insinuations and delusions, threats, and menaces, prevailing on the son and heir apparent of any person having lands of the yearly value of 50*l.* or personal estate of the value of 500*l.* to marry her, is rendered incapable of demanding any Dower or thirds, or other interest out of the real or personal estate of her husband.(*h*)

It only remains to add under this head, that if detinue of charters by the demandant is pleaded to a writ of Dower, and the demandant denies the detinue, and takes issue thereon, and it is found against her, according to the books she shall lose her Dower.(*i*)

Supposing all the circumstances requisite to the attachment of a title of Dower to have concurred, and no act to have been done either by the [*228] husband *or wife by which that title is barred, extinguished, or forfeited, there may yet exist a personal disqualification on the part of the wife, to prevent her becoming entitled to the benefit provided for her by the law.

At this day, the only existing disqualification of this nature appears to be that of ALIENAGE.(*k*) The law, which *nihil facit frustra*, will give no estate which it does not enable the donee to keep, and therefore an alien can take nothing either by Descent, Curtesy, or Dower.(*l*)

This disability appears to have been partially removed by an act of parliament of Hen. V. (not inserted in our statute book) by which aliens who from thenceforth should be married to Englishmen *by license of the king*, are enabled to demand their Dower after the death of their husbands in the same manner as Englishwomen.(*m*)

It seems also that the Queen consort is dowable, though an alien, by the law of the crown.(*n*)

(*d*) Green v. Harvy, 9 Vin. Abr. 241.

(*e*) Perk. sec. 364 (cites H. 6 H. 3. 102.) (*f*) Ib. sec. 365.

(*g*) 2 Inst. 436, (cites T. 9 E. 2.)

(*h*) See Kent v. Whitby, 4 Bro. P. C. 362, where it was held that this being in nature of a penal statute must be construed strictly, and therefore when it is pleaded to a writ of dower, the jury must expressly find that subtle means, &c. were used, for they are not to be presumed from the circumstances of the marriage being private, without the father's consent.

(*i*) Hob. 199, per cur. in Brickhead v. Archbishop of York, and see chap. xiv. infra.

(*k*) Doctr. Plac. 148. Co. Litt. 31 *b*. Jenk. Cent. 1. ca. 2.

(*l*) Per Hale, C. B. 1 Vent. 417. Molloy, 364. 7 Co. 25. 2 Danv. 321.

(*m*) Rot. Parl. (Vol. IV. p. 128) 8 H. 5. n. 15. Hargr. Co. Litt. 31, *b*. n. (9.) 2 Danv. 652, pl. 3.

(*n*) Co. Litt. 31, *b*.

The disqualification of alienage may be removed either by denization, or naturalization; but as to the effect of these two modes there is an important distinction, for in the former case, if the husband aliens the land before the wife is denizened, she will not be entitled to Dower, "because (says Lord Coke) *her capacity and possibility to be endowed come by the denization."(*o*) [*229]

According to a case in Jenkins, an Englishwoman residing in France at the time of war between the two nations, shall not have her Dower in England of her husband's lands until there is peace; and the reason given is, that she is under the power of the king of France, and if she should have her Dower while she resides there, it would tend to weaken the king of England.(*p*) The point will scarcely be considered law at this day.

As an alien, although he has a capacity to purchase lands, can only hold them for the benefit of the king, the wife of an alien, although an Englishwoman, can derive no title of Dower; for as he has no interest in the lands himself, no person can have any interest by him.(*q*)

It was formerly held that the profession of Judaism by the wife, was a disqualification to her enjoyment of Dower. The following case is put by Lord Coke:

"A Jew born in England taketh to wife a Jew born also in England, the husband is converted to the Christian faith, purchaseth lands, and enfeoffeth *another, and dieth; the wife brought a writ of Dower, and was barred of her Dower; and the reason yielded [*230] in the record is this, *Quia verò contra justitiam est, quod ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione sua noluit cum eo adhærere et cum eo converti.*"(*r*)

This law may, without much hazard, be stated as obsolete.(*s*)

*CHAPTER XI. [*231]

Of ALIENATIONS *and* CHARGES *by the* HUSBAND ALONE, *previous and subsequent to the attachment of a* TITLE OF DOWER.

ANY effectual alienation by the husband, previous to the attachment of a title of Dower, confers an estate on the alienee which will be good against the wife, although she afterwards survives her husband. The estate being taken out of the husband, is placed beyond the reach of the attachment of the title of Dower; for a woman is not dowable of such estates as her husband was seised of *at any time*, but of such estates only as he was seised of at any time *during the coverture*.(*a*)

(*o*) Co. Litt. 33, *a*. 13 Co. 23. Jenk. Cent. 1. ca. 2.

(*p*) Jenk. Cent. 1. ca. 2. (cites 4 H. 3. Dow. Fitz. 179. Stamf. Prær. ch. 12.)

(*q*) Co. Litt. 31, *a*. (cites Bract. f. 298. 19 E. 2. Dow. 171. Dame Hale's case, 13 E. 3. Dow. Statham. 13 E. 1. Dow.)

(*r*) Co. Litt. 31, *b*. (cites Dors. claus. 18 H. 3. M. 17.) Jenk. Cent. 1. ca. 2. (cites 3 H. 6. 55.)

(*s*) See the very learned disquisition on the laws of England with regard to Jews in Plowden on Usury, Part I. Chap. iii.

(*a*) See p. 24, supra.

The rule is generally propounded that the title of Dower will be prevented by any alienation by the husband *before marriage;* but under some circumstances this may happen as well by an alienation after marriage as before, and therefore the correct mode of stating the rule is, that the alienation shall be previous to the attachment of the title of Dower. For if the husband has an estate in lands which, by reason of any precedent or interposed estate of freehold existing in another person,
[*232] at the time of the alienation, is not subject to an incipient title of *Dower, an alienation of that estate, whether before or after marriage, will prevent the wife from ever becoming entitled, although the particular estate afterwards determines, or is consolidated, in the life-time of the husband. In this case, although the husband is seised during the coverture, the estate is not of such a quality, during his seisin, as a title of Dower will attach upon; and it was not till after his alienation that it attained that quality.

If however the estate of the husband is of such a quality as that Dower incipient will attach upon it, the alienation must necessarily be before the marriage is solemnized to transfer a title discharged of Dower.

For this purpose it is sometimes necessary to distinguish between alienations which are *voidable* only, and those which are *ipso facto* void; for although the alienation were voidable, yet if it never was avoided during the coverture, there will of course be no title of Dower. But if the alienation were simply void, the seisin never having been transferred to the alienee, remained in the husband, and became subject to the attachment of Dower.

This question has sometimes arisen upon the effects of different modes of alienation by tenants in tail; since, in some cases, an alienation by a tenant in tail is merely void, and in other cases is voidable only; and consequently the question that the wife is or is not dowable of the estate tail, will depend upon the mode of alienation which was adopted. It is now clearly settled, that if a tenant in tail conveys to a man and his heirs by bargain and sale, lease and release, or covenant to stand seised
[*233] to *uses, a base fee passes, commensurate with the time of the estate tail, though defeasible by the issue in tail when their right to the possession accrues.(*b*) If therefore a tenant in tail conveys in either of those modes before marriage, as the estate of the bargainee, releasee, or covenantee is good as against the tenant in tail himself, there will be no seisin in him during the coverture. It is admitted likewise that where the conveyance operates by transmutation of possession, the tenant in tail may limit the use by way of remainder, even though that remainder cannot take effect till after his death; as where it is previously limited to himself for life, remainder to another.(*c*) It is admitted also that although the conveyance does *not* operate by transmutation of possession, the use may be limited by way of remainder, if it may by possibility take effect in the life of the tenant in tail, as a bargain and sale or covenant to stand seised to the use of the *covenantee* for life, remainder to J. S. in fee.(*d*) But it is clearly decided(*e*)

(*b*) Machel v. Clarke, 2 Raym. 778. Salk. 619. 11 Mod. 19. Holt. 615. Goodright v. Mead. 3 Burr. 1703.

(*c*) 2 Raym. 782. Goodright v. Mead, ubi sup.

(*d*) 2 Raym. 782.

(*e*) Machel v. Clarke, ubi sup.

that if on a conveyance by tenant in tail without transmutation of possession, the use is so limited that the remainder cannot take effect till after his death, (as to himself for life, remainder to another) the remainder is void, and as a covenant by tenant in tail to stand seised to the use of himself *for life is only good for the sake of remainders, if the remainders are void, the whole is void, and he continues seised of his old estate tail. In this case, therefore, the wife will be dowable, although married after the covenant to stand seised, and there are several cases in the old books where it has been so determined.(*f*) [*234]

This point can rarely occur in practice, now the mode of making settlements by lease and release to uses has become so universal.

Instances may occur in which an alienation by the husband may not take effect till after the title of Dower accrued, and yet, by force of the doctrine of relation, may avoid that title of Dower, by making it in effect an alienation before marriage, or before the title accrued. A case put by Shepherd, in his Touchstone,(*g*) affords an example of this, "If A. bargain and sell his land to B. in fee, and then marry C. and die, and C. is endowed, and after the deed is enrolled; in this case the Dower of the *woman shall be taken away by relation, as was held in Baron Frevil's case, 22 Eliz. C. B." [*235]

The same principle would apply to the doctrine of exchanges at common law. In these cases, until the exchange is executed by entry, the seisin remains in the original owners, but it may be assumed that if the exchange was made before marriage, the execution of the exchange after marriage would have relation to the time of the exchange made, so as to carry the lands given in exchange free from the title of Dower in the wife.

Another instance sometimes occurs in practice to which the same principle may be applied. A person having a remainder in fee, subject to a previous estate of freehold in another person, or having the immediate freehold, and also the inheritance in remainder upon an interposed estate of freehold, marries, and becomes bankrupt, and between the act of bankruptcy and the bargain and sale to the assignees, the particular estate of freehold determines; so that the title of Dower attaches. The bargain and sale, when made, having, by force of the bankrupt laws, relation to the act of bankruptcy, so as to defeat and over-reach all mesne titles of this nature,(*h*) the assignees can make a title to a purchaser discharged from the Dower of the bankrupt's wife,(*i*) and the better opinion is that the purchaser cannot require a fine.

(*f*) Higham v. Bedingfield, Noy 46. Blitheman v. Blitheman, Cro. Eliz. 279. 1 And. 291. In the latter case it was a mere executory covenant that after the death of the covenantor the lands should descend, remain, and be to his son and his heirs. But the court said that if it had been a covenant to stand seised to the use of himself for life and after to his son, this had been void to alter the use to the son. The principle however upon which they grounded this, "that he being tenant in tail, and reserving to himself an estate for his own life had reserved all that he might lawfully dispose of," cannot now be acceded to as the true ground. See also Yelv. 51. Moor, 683.

(*g*) P. 226. and see Gilb. Uses, 97. Cro. Car. 569.

(*h*) See Kiggil v. Player, 1 Salk. 111.

(*i*) The point has been determined, in effect, by the cases of Parker v. Blicke, Cro. Car. 568, 569, and Benson v. Scott, Carth. 275. 1 Salk. 185. 3 Lev. 385. 4 Mod. 251. 12 Mod. 49; though those were cases of Freebench, where the custom was that the husband *must die seised* to entitle the widow: but the circumstances of those cases bring them up to the case of dower mentioned above.

[*236] *An alienation or settlement by the husband, although immediately before the marriage, and with the express intention of excluding the wife of her Dower, could not, it is understood,(*k*) be impeached as a fraud upon the marital rights of the wife as in the case of a woman making a settlement of her estates, unknown to her intended husband, on the eve of marriage.

It is obvious that as the husband may by aliening the lands at any time before marriage, or before the title of Dower has attached, altogether intercept that title, and prevent its ever arising, he may, under the same circumstances, create derivative interests or charges which shall be good against the wife when her title to be endowed is complete by the death of her husband.

Thus his leases,(*l*) his statutes, or recognizances,(*m*) &c. are all binding on the wife, and she shall hold the lands assigned to her in Dower subject to them; and although the husband was tenant in tail, and made a lease unauthorized by the statute, yet that lease will be binding upon the wife.(*n*)

[*237] It may however be observed, as incidental to this point, that if the husband, previous to marriage, *acknowledges a statute or recognizance, and afterwards dies, his heir within age, and part of the land is assigned to the wife for her Dower, the Dower of the wife shall not be extended during the nonage of the heir; for all the lands are liable *pro rata;* and as the lands of the heir within age cannot be charged, so neither shall the lands of the dowress; for otherwise the whole burden should fall upon her. But if *all* the lands had been assigned to her for her Dower, they should be extended during the minority of the heir.(*o*) And it seems, even in the former case, that the nonage may be relieved against in equity.(*p*)

After a title of Dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of alienation or charge.(*q*) It is a right attaching by implication of law, which, although it may possibly never be called into effect (as if the wife die in the lifetime of the husband,) yet, from the moment that the facts of *marriage* and *seisin* have concurred, is so fixed on the land as to become a title paramount to that of any person claiming under the husband by subsequent act.(*r*) The alienation of the husband, therefore, whether volun-

[*238] tary, as by deed or will, or involuntary, as by *bankruptcy &c. will confer no title on the alienee against the wife, *quoad* her Dower, but she will be entitled to recover against such alienee, (except as to damages)(*s*) in the same way as she would have recovered against the heir of the husband, had he died seised.

(*k*) And see M. 9 and 10 E. 1. coram rege, rot. 24. Ebor. (cited Hargr. Co. Litt. 33, *a.* (n.)

(*l*) Eng. Lutw. 230. Winch. 80. Cro. Eliz. 564. Co. Litt. 32, *a.* Stoughton v. Leigh, 1 Taunt. 410.

(*m*) Jenk. Cent. p. 36. As to Crown debts, see chap. xvi.

(*n*) 2 Preston on Conv. 132, and see 7 Co. 73.

(*o*) Jenk. Cent. p. 36. 37. 8 E. 1. Fitzh. Ass. 417.

(*p*) 1 Lev. 198.

(*q*) 3 Lev. 386. It is remarked in Godb. 323, that "if a man commit treason, he shall forfeit the dower of his wife, yet he doth not *give* the dower of his wife, but it goes by way of discharge of those lands."

(*r*) Co. Litt. 32, *a.* F. N. B. 147 (E.) (*s*) See chap. xiv. infra.

It is a necessary consequence of this rule, that all charges or derivative interests created by the husband, subsequent to the attachment of the wife's title, are voidable, *quoad* that part of the land which is recovered in Dower. As if "tenant in fee simple takes a wife, and then makes a lease for years, and dieth, the wife is endowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again.(*t*)

So if the husband, after marriage, acknowledge a statute, or recognizance, the wife shall nevertheless hold her Dower discharged.(*u*)

And as the heir can be in no other situation than the husband, it follows of necessity that all charges made by the heir in the interval between the death of the husband, and the assignment of Dower, will *be void as against the dowress, and she shall [*239] hold discharged.(*v*)

As the husband cannot defeat his wife's title of Dower by any alienation of the land by himself alone, so neither can he bind her by any modification of the nature of the seisin, or any merger or extinguishment produced by his own act, without her concurrence. All such operations will take effect *sub modo*, and liable to be avoided, *quoad* the estate of the dowress.(*w*)

As if a person having a seignory, marries, and afterwards purchases the tenancy in fee, or if the owner of a rent-charge purchase the land out of which the rent is issuing, the widow shall have her election to be endowed in the one case, either of the seignory or the tenancy, and in the other, either of the rent or the land.(*x*) The land might indeed be so conveyed as not to confer a seisin on the husband on which a title of Dower could attach, and in that case there could of course be no election but it is clear that the widow might demand her Dower of the seignory, rent, &c. notwithstanding its extinguishment as to other purposes. As in the case put by Perkins, "if grantee of a rent-charge in fee take a wife, and the grantor lease the land out of which the rent is issuing unto a stranger for life, and the grantee of the rent purchase the reversion *of the same land, and the tenant for life attorn, [*240] and the grantee of the rent dieth leaving the tenant for life, his wife shall be endowed of the rent, but not of the land, because the freehold and inheritance were not in the husband *simul et semel* during the coverture."(*y*) So if the owner of a rent-charge, after marriage releases the rent to the terre-tenant, the widow shall notwithstanding be endowed of the rent.(*z*) In this case the remedy of the widow is against the terre-tenant, and not against the heir of the husband, for the heir has

(*t*) Shep. T. 273, 274. Stoughton v. Leigh, 1 Taunt. 410. Co. Litt. 46, *a*. S. P. as to tenant in tail, 7 Co. 8, 72. In practice this point is never adverted to as to leases at rack-rent, as the rent is an equivalent for the possession, and ceases on eviction, and it is very improbable that a dowress would evict a responsible tenant unless there is any gross discrepancy between the rent and the actual value; but as to building leases, or other leases for the purpose of improvement, the point seems to deserve more attention than is usually directed to it. The rarity of actual evictions by a dowress is probably the cause of the existing absence of solicitude.

(*u*) Jenk. Cent. p. 36. As to Crown debts, see chap. xvi.

(*v*) Bro. Seisin, pl. 18. (cites P. 19 E. 2.) Co. Litt. 42, *a*. (cites 7 H. 5. 4.)

(*w*) Co. Litt. 32, *a*. (*x*) Perk. sec. 320.

(*y*) Perk. sec. 340.

(*z*) 6 Co. 79. (cites 5 E. 2. Dow. 143. 10. 20 E. 3. 27. 24 E. 3. 29. 34 Ass. 15. 22 E. 3. Dow. 131. 44 E. 3. 32.) 7 Co. 130, where see the form of the writ of dower in such case, S. P. as between lord and tenant. Perk. sec. 322.

nothing for which the writ can be brought, and though the tenant has not the rent, yet he has the land out of which the rent issues, and the tenant of the land pays it.(*a*) A case put by Perkins shows that in some instances the wife may be benefited by the release or surrender of the husband. "Lord and tenant are by fealty and twelve-pence [rent]; the tenant taketh a wife, and the lord purchaseth the tenancy in fee, and the estate is executed in him, and the tenant dieth, and his wife is endowed of the third part of the tenancy; now she shall not be attendant for any rent, because that by the purchase of the tenancy in fee by the lord, the seignory was determined, and a thing which is determined cannot be revived.(*b*)

[*241] *And it may happen in some cases that the wife will conclude herself from avoiding charges created after the title of Dower commenced, by praying damages upon her recovery in Dower; for as she can have no damages unless the husband died seised,(*c*) by praying damages, she accepts herself dowable of that estate of which the husband was seised *at his death;* and if, at the time of the charge created, he had a different estate in the land, that charge will be sustained against her; for of that estate the husband did not die seised; and if she had elected to take her dower of that estate, she could not have prayed damages. As when A. seised of lands in fee married, and granted a rent charge, and afterwards made a feoffment in fee, and took back an estate tail, and died, and the wife recovered Dower against the issue in tail by reddition, and making a surmise that her husband *died seised*, prayed a writ of inquiry to assess damages, which was granted to her; in this case, remarks Coke, she holds the land charged with the rent charge, for by her prayer she accepteth herself dowable of the second estate, for of the first estate whereof she was dowable, her husband died not seised, and so she hath concluded herself; wherefore if the rent charge be more to her detriment than the damages beneficial to her, it is good for her in that case to make no such prayer.(*d*)

It should also be observed, that if the widow accepts Dower of the

[*242] heir *against common right*, in *that case she shall hold subject to the charges of the husband,(*e*) at least ast o so much of the land charged whereof she is endowed against common right. As "if a man be seised of three manors in fee, and take a wife, and granteth a rent charge issuing out of all the three manors, and dieth, and the wife taketh one manor by assignment of the heir for her Dower, in allowance of all the three manors; now two parts of this manor doth remain charged to the distress of the grantee, notwithstanding that the grant of the rent charge was made during the marriage: and the reason is, because that as to the two parts she had taken her Dower against common right; for according to common right she ought to have the third part of every manor."(*f*) This doctrine however appears only to extend, generally, to assignments made without suit, for it is added, "but in the same case, if she had recovered her Dower, and such assignment had been made

(*a*) Jenk. Cent. 1. ca. 6, (cites 22 E. 3. Dow. 131.)
(*b*) Perk. sec. 429, (cites M. 21 E. 3. 130.)
(*c*) See post, chap. xiv. (*d*) Co. Litt. 33, *a*. (cites 14 H. 8. 28.)
(*e*) Co. Litt. 32, *b*.
(*f*) Perk. sec. 330, (cites M. 26 E. 3. 133. T. 17 E. 2. 164.) and see Hargr. Litt. 32, *b*. note (2.)

unto her by the sheriff, she should have holden the same discharged."(*g*) But if a man be seised of three advowsons of three several churches, and taketh a wife, and granteth unto a stranger that he shall present to the next avoidance of the three churches which shall first become void, and the grantor dieth, his wife bringeth a writ of Dower against the heir before any church become void, and recovereth; and the sheriff doth assign unto her the advowson of one church for her Dower in allowance of the *other churches, which advowson assigned unto her doth first become void after the grant made by the husband, [*213] and the avoidance happeneth after the assignment of the Dower, it seemeth unto some in this case that the wife shall not have this avoidance, but the grantee shall have the same: because that she is endowed against common right, for of right she ought to have but the third avoidance of each advowson of each church. And notwithstanding that the assignment be made by the sheriff it shall not prejudice nor oust the grantee of his right, because he is a stranger unto the assignment, and also he cannot otherwise take advantage of his grant, but only at this avoidance, *tamen quære.* But otherwise it is in case of a grant of a rent-charge out of three manors, for when the assignment is made by the sheriff of one manor in allowance of all the manors, the grantee may distrain for the whole rent in the other two manors, and in every part of them; and it shall not be more prejudicial unto the heir this way than the other way."(*h*)

It frequently happens also that a person who purchases *bonâ fide* from the husband after the title of Dower has attached, may protect himself from an eviction under that title, by taking an assignment of some prior term to a trustee for himself. This is a point of such frequent occurrence and discussion in practice, that the student should be recommended to make himself familiar with the learning on the subject which he will find discussed in a subsequent chapter.

*As a qualification to the rule that the husband cannot defeat the wife of her Dower by alienation after marriage, [*244] must be noticed the cases of alienations by force of particular customs, in which cases, the estate of the customary tenant or alienee, takes effect in point of title, by relation to the custom, and not merely from the actual period of the grant. Thus if the husband be lord of a manor, in which there are customary tenements, demiseable for lives by copy of court roll, and before or during the coverture, the lives expire, and the lord afterwards grants new copies, and dies, the wife shall hold her Dower of the manor subject to these copies, and shall not avoid them.(*i*) So also, if there be a custom to grant copies in reversion, expectant upon existing copies for life, such grants, though made after the marriage of the lord, will be binding upon the wife.(*k*) And although, in the case first put, the copy for lives had determined during the coverture, and the lord had entered, and kept the lands for a time, yet, if he afterwards grants a new copy, the copyholder shall hold the land discharged of the Dower.(*l*) The principle in all these cases is, that the copyholder is in

(*g*) Ibid.

(*h*) Ibid. sec. 331, 332.

(*i*) Browne's case, 4 Co. 24; 8 Co. 63. *b.* said to have been so adjudged; and see Sneyd v. Sneyd, 1 Atk. 441; and p. 45, supra.

(*k*) Cham v. Dover, 1 Leon. 16, adjudged.

(*l*) Per Gawdy, J. in Cham v. Dover; 1 Leon. 16.

by the custom, and not by the act of the lord: and the custom is paramount the title of Dower.(*m*) *Till, therefore, the demiseable quality is destroyed by non-user, or otherwise, the husband may at any time charge the Dower of the wife with a new demise by copy. The estate of the copyholder is not derived out of the ownership of the lord, but the lord is only as an instrument to make the grant.

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It is scarcely necessary to mention, that in order to afford this protection against Dower, the custom must be strictly persued; and therefore where the custom of a manor was, that the land was used to be demised by the lord of the manor, or his overseer, or his deputy, and a man seised in fee of the manor, married, and made his will, and thereby gave authority to certain persons to make leases according to the custom of the manor to raise fines to pay his debts, and died; and those persons held a court in their own names, and granted a reversion belonging to two men who were copyholders to three others, it was held, upon demurrer, that the wife, who had had the third part of the manor, including these copyholds, assigned to her by the sheriff, should avoid the grant made by the persons authorised by the will.(*n*) And yet, it seems such grant is good in other respects.(*o*)

It has also been formerly decided, that the simple alienation of the husband may be a good customary bar to the wife's title of Dower, where she partakes *of the benefit of the sale, as where a custom was pleaded that if the baron aliens the land, and expends the money between himself and his feme, she shall be barred of her Dower; and a like custom, where the feme receives part of the purchase money; both these customs were held good.(*p*) The writer is not aware that any such customs are considered as existing at this day.

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It should also be noticed as the prevailing impression of the profession that under enabling acts, such as those of the West-India and London Dock companies, the Grand Junction Canal, and the improvements at Temple Bar, Snow Hill, and Smithfield, the wife's title of Dower will be bound by the alienation of the husband, although the title is taken by way of conveyance only, and the purchase money is not invested in other lands, or paid into the Bank. This is understood to have been the opinion of several gentlemen of high professional reputation, in answer to the requisition of an eminent conveyancer, who, on the behalf of the corporation of London, had called for fines from vendors whose wives had titles of Dower, and the writer believes that the subsequent practice in the great majority of cases has been to dispense with fines.

(*m*) 1 Leon. 16, in Cham v. Dover; 8 Co. 63. *b*. in Swayne's case; 4 Co. 24, in Browne's case. In Cordel v. Clifton, 2 Leon. 152, a different and mistaken reason was assigned by Periam, J. viz. that the title of dower is not consummated before the death of the husband, so as the title of the copyholder is completed before the title of dower. This reason would equally prove, that every estate made by the husband during the coverture, would prevail against the dower.

(*n*) Slowman's case, Dy. 251. *a*.; 1 Leon. 16. S. C. cited.

(*o*) Co. Litt. 58. *b*.

(*p*) Bro. Customs, pl. 78 (cites 3 Ed. 3;) pl. 53 (cites 20 E. 3.) Bracton says, that there is a custom in Lincoln, that if the husband sell his inheritance for need, his wife shall not have dower of it, but otherwise if he mortgage it, or make a lease thereof for need. Bract. 309.

*CHAPTER XII. [*247]

Of the CONSUMMATION *of the* TITLE OF DOWER *by the* DEATH *of the husband.*

THE last circumstance requisite to the completion of a *title* of Dower, is the death of the husband.(*a*) From this period, the incipient title which existed in the wife during the coverture, becomes consummated and perfected, and her right of action to obtain the fruits of that title commences.

It seems to have been the old law that, where it could not be made to appear positively that the husband was dead, as where he was absent beyond seas, and no intelligence of him could be obtained, the wife might recover Dower conditionally, viz. that if he did return from beyond seas, she should render back her Dower to the feoffee of the husband, without suit, and receive the profits in the mean time, with sufficient sureties on her part to do the same, or otherwise the tenant to keep the land.(*b*)

In a later case, where issue was taken upon the death or life of the husband, the demandant brought two witnesses, whereof one was the brother of her husband; but their testimony tended to no full proof, but only by conjectures and presumptions, viz. "because the husband departed the kingdom in *the first year of Queen [*248] Mary, on account of his religion, and was a minister, and for these seven years has been absent, and in this time of this religion restored here, he is not come back, nor can any merchant of that country, *sc.* of Germany, or Englishmen who travel in those parts, tell of his being alive, nor is there any token of it; wherefore they conclude in their consciences, that they rather think him dead than alive." And no witness of the life of the man being produced by the tenant, judgment was given upon this evidence for the demandant. And a case was cited of M. 2 E. II. 24, where, in *Cui in vitâ*, the death of the husband of the demandant was proved by four, who agreed in all points, and at the essoin day, the tenant produced twelve proofs of the life of the man, who also agreed in all points, which proof was holden stronger, wherefore the demandant was barred.(*c*)

It is observable that this question of the death of the husband, when brought in issue on a writ of Dower, is not triable by a jury, but by the court, *per testes;*(*d*) and it has been said, that after the court have given judgment upon the proofs, the matter shall never be brought in question again upon better proofs, for this is in effect to attaint the court, and impeach their credit.(*e*)

It has been formerly held, that the civil death of the husband by his entry into religion, shall not consummate *his [*249] wife's title of Dower, although his heirs should inherit immediately, and the reason is said to be because he cannot be professed in religion with-

(*a*) Litt. sec. 36.
(*b*) Hughes' Writs, 159 (cites Bract. 302. pl. 2.); and see Woman's Lawyer, p. 274.
(*c*) Thorne v. Rolff, Dy. 185. *a.*; 1 And. 20; Moor. 14, 15; Bendl. 89. S. C.
(*d*) See Thorne v. Rolfe, Moor. 14. (*e*) Hard. 127. arg.

out her consent and agreement, otherwise she might deraign him, and so by her own assent, she in a manner vows chastity as well as her husband.(*f*)

But this question cannot now arise. Even when popery prevailed in this country, and professed persons were legally established here, it was held that a profession in religion in any *foreign* country, did not work a disability in this, because the fact could not be tried;(*g*) and since the reformation, as there can be no *legal* profession in this country, the ancient disability from it has entirely ceased.(*h*)

It is stated in the old law books, that the wife of a man who is banished by abjuration, or by act of Parliament, shall recover her Dower in his lifetime, for this is a civil death.(*i*)

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*CHAPTER XIII.

Of ASSIGNMENT *of* DOWER.

By the statute of Magna Charta, cap. 7, it was provided, that the widow should "tarry in the chief house of her husband by forty days after the death of her husband,(*a*) within which days, her Dower should be assigned her, if it were not assigned her before; or, that the house be a castle; and if she depart from the castle, then a competent house should be provided for her, in which she might honestly dwell until her Dower was to her assigned as it is aforesaid, and she should have in the mean time her reasonable estovers of the common.(*b*)

[*251] *In this chapter it is to be considered,

I. In what manner Dower is assignable, with regard to the subject matter or property to be assigned, whether by the sheriff or other persons.

(*f*) Perk. sec. 307 (cites 10 H. 3. Dow. 200.) Jenk. Cent. 1. ca. 4. 32 E. 1; Dow. 176; Fitz. N. B. 150. (F) (cites 13 E. 19. Dow. 161.) Co. Litt. 132. *b.*

(*g*) Co. Litt. 132. *b.*; 2 Roll. Abr. 43. *b.*

(*h*) Gilb. Uses, by Sugd. 87. n. (cites Roll. Abr. ubi supra) Rex v. Lady Portington, 1 Salk. 162; Wright's Ten. p. 28. n. (Y); Hargr. Co. Litt. 3. *b.*

(*i*) Jenk. Cent. 1. ca. 4; and see Co. Litt. 133. *a.* In Cotton v. Westcott, 3 Bulstr. 188, it was said by Coke, C. J. that in Weyland's case, 18 E. 1, the wife brought her writ of dower, after Weyland's banishment, and it was held the same did not lie, though she was afterwards held entitled to her jointure, but in the case of the wife of Sir Robert Belknap, temp. H. 4 (see Moore, 851;) Belknap was banished, and his wife had her dower. Doddridge, J. added, that in 10 E. 3 (see 1 Roll. R. 400,) the wife of Matravers brought a writ of dower, her husband being in banishment, and held maintainable.

(*a*) And be sustained with victuals there, Jenk. cent. 7, ca. 16. But contra per Newton, F. N. B. 162. (A.) marg. But adds, that Fitzherbert in abridging the case, queries if she may not kill any thing for her provision, if there be not any provision in the house.

(*b*) Mr. Barrington remarks, that "one of the reasons for the widow continuing forty days within the capital messuage, was to prevent a supposititious child, which deceit was not uncommonly practised in those times, as may be inferred from the old writ *De ventre inspiciendo.*" Obs. Anc. stat. 10.

If during this forty days, or quarentine, as it was called, the heir or tenant of the land put her out, the widow might have her writ *De quarentina habenda.* Gilb. Dow. 372. F. N. B. 161. But her habitation in the house is personal to her in respect of her widowhood, and therefore, if she marries within the forty days, she loses her quarentine. Co. Litt. 34. *b.* 32. *b.* It has been made a question, whether a woman staying in the house of her husband during her quarentine, may defend the possession thereof with force. Dy. 161. *a.*

II. What persons, in respect of interest in the land, are competent to make a valid assignment of Dower, *in pais*, namely, when it is not assigned by the sheriff or commissioners upon suit.

I. In what manner Dower shall be assigned, and therein,

1st. Of assignment according to common right.

Unless hindered by the peculiar circumstances of the property, or the nature of the tenancy therein, the widow has a right to have her Dower assigned to her in severalty, "by metes and bounds."(*c*) The reason assigned by Chief Baron Gilbert is because it was a *tenancy* of the heir, and like all other lands *in tenure*, ought to be separated from the demesnes of the manor.(*d*)

Where, indeed, the husband was himself seised in common, or in coparcenary, there the wife cannot have her Dower assigned by metes and bounds, but shall have the third part of the share of her husband to hold in common with the heir, and the other tenants.(*e*)

*And of some property of the husband whereof the wife may be dowable, she shall not have an assignment by metes and bounds, by reason that the thing itself is of such a quality that no division can be made thereof, and therefore she shall be endowed in a special manner. As of a mill, a woman shall not be endowed by metes and bounds, nor in common with the heir, but she may be endowed either of the third tolle-dish, or of the entire mill, for every third month.(*f*) [*252]

So of many other hereditaments which are not manurable, she shall be endowed specially, of a third part *of the profits*.(*g*) As of—

A piscary;(*h*)

Offices;(*i*)

A fair;(*k*)

A market;(*l*)

A dove-house;(*m*)

Courts, fines, heriots;(*n*)

The keepership of a park.(*o*)

The entirety, however, of any such hereditaments may, by agreement of competent parties, be assigned *to the wife in allowance of her Dower of other property.(*p*) [*253]

And it seems that, although a third part of the profits only is assigned to the wife, she shall thereby have the freehold of a third part of the hereditament itself.(*q*)

Of an adowson in gross, she shall be endowed of the third part by

(*c*) Litt. sec. 36; Co. Litt. 34, *b*. (cites 20 E. 3. Barre. 132. 45 E. 3. 6. Fleta. l. 5. 23.) Perk. sec. 411. 414.

(*d*) Gilb. Uses, 356. 397.

(*e*) Litt. sec. 44; Co. Litt. 32. *b*.; 2 Raym. 785. F. N. B. 149; Perk. sec. 412; but see Gilb. Uses, 397.

(*f*) Co. Litt. 32. *a*. (cites 1 Ro. Abr. 682. Bract. l. 2. f. 97. *b*. 23 H. 3. tit. Ass. 435. 45 E. 3. Dow. 50.) Perk. sec. 342; N. Bendl. 120; and see 2 Keb. 8. 41; Perk. sec. 415. where it is added, "And she shall grind there toll free." F. N. B. 149 (K.)

(*g*) See ante p. 112.

(*h*) Viz. *tertium piscem vel jactum retis tertium*. Co. Litt. 32. *a*.

(*i*) Ibid. F. N. B. 8, note (*b*) 149 (K.)

(*k*) Ibid.

(*l*) Ibid. Gilb. Dow. 371.

(*m*) Co. Litt. 32. *a*.

(*n*) Ibid.

(*o*) Ibid.

(*p*) See the succeeding section of this chapter.

(*q*) See F. N. B. 8. note (*b*,) 149 (K.)

presenting at every third avoidance;(*r*) or, of the moiety of an adowson in gross, by presenting at every sixth avoidance.(*s*)

As to tithes, it was held in the Countess of Oxford's case, that the most equal assignment is of the third sheaf; for if the garbs of the third part of the arable land were assigned, it would be in the election of the terre-tenant, whether he would sow it or not.(*t*) But it seems, that the assignment is good, though the tithes of the third yard land be assigned.(*u*)

In Dower of the tithes of wool and lambs, it was demanded of the court how the sheriff should deliver seisin, and the court held it the best way for the sheriff to deliver the third part of the tenth part, and the third tenth lamb, viz. the thirtieth lamb.(*v*)

Of mines, which were opened in the lifetime of the husband, whether in his own land, or in the lands of others, it was held in a late case, that the sheriff may lawfully execute his duty by assigning such a number of
[*254] *them as may amount to one-third in value of the whole, or by directing separate alternate enjoyment of the whole for short periods, or by giving the widow a proportion of the profits.(*w*)

It is said that the heir is not compellable to assign unto his mother for her Dower the capital messuage which was his father's, or any part thereof, although she be dowable of the same. But he may assign unto her other lands and tenements, of which she is dowable, in allowance of the capital messuage.

But if there are not any other lands or tenements of which she is dowable, and the heir assigns unto her a chamber in the capital messuage, in the name of Dower, and in allowance of the same messuage, and she agrees thereto, it is a good assignment. But it seemeth (says Perkins), she is not compellable to take the same, because the messuage is as it were an entire thing; and it shall be but trouble and vexation unto a woman to have a chamber within the house of another man; and if she will not agree unto the same, then the heir may assign unto her a rent issuing out of the same messuage in the name of her Dower.(*x*)
[*255] *It is difficult to gather from the books any distinct proposition, as to the mode in which the proportion of the dowress is to be estimated and ascertained, in setting out her Dower. It is obvious, that if regard were to be had to the *quantity* alone, a mere

(*r*) Perk. sec. 342; Co. Litt. 32. *a.*; 3 Leon. 155; 17 E. 3. 38. *b.*; contra 17 E. 3. 22. *b.*

(*s*) Woman's Lawyer, 1632. 4to. p. 98.

(*t*) 11 Co. 25. *b.*; Co. Litt. 32. *a.*; Roll. Rep. 68.

(*u*) Kettleby's case, Hargr. Co. Litt. 32. *a.* n. (3.)

(*v*) Anon. Brownl. 126.

(*w*) Stoughton v. Leigh, 1 Taunt. 410. Some observations have already been made on this case, at p. 116, to which the reader is requested to refer.

(*x*) Perk. sec. 406 (cites H. 33 H. 6.) sec. 342 (cites M. 45. E. 3. Dow. 50. 16 Ass. 41.) The author of The Woman's Lawyer, 1632, 4to, observes, that "by the old writers, a woman cannot challenge a castle, chief mease, or head of any barony or county, or any thing within the close or circuit of the chief mease to be assigned her in dower, but for her habitation she may choose *aliquod honestum messuagium de villenagiis*, that is, some bond tenements within the manor. And where there is none such to choose, she shall have one clapped up for her *in aliqua platea competenti de communi bosco*, as long and broad as the third part of her husband's chief house. If there be neither base tenement, nor wood, nor ground wherewith and whereon to build a widow's habitacle, she may be endowed (for necessity,) of the principal messuage, and without necessity always, if the heir be so contented." p. 99, 100.

illusory assignment might be made, by setting out a tract of land of little or no annual value; and in modern times, the relative value, even of adjacent property, is often enormously disproportionate, in consequence of buildings, and numberless other circumstances. That an assignment of one-third in value, and not in point of *quantity* merely, was what was contemplated by the old law, admits of no doubt; but in the simple state of property in former times, it is probable that the only provision that was made for the security of the dowress was, by requiring that the sheriff should assign to her a third part of each existing denomination of property. Thus, he was bound to assign her a third part of each manor, if there were several; or a third part of the arable, a third part of the meadow, and a third part of the pasture.(*y*) In assignments by the heir, it was a matter of arrangement between him and the widow, what particular portion of the property should be set out, and if they could not agree, she resorted to her suit.

With some apparent dereliction of principle, we find it asserted by Perkins, that buildings or other *improvements made *by the alienee of the husband*, shall not be included in the computation of value on the endowment of the wife. The passage is as follows. "If a man be seised of twenty acres of land in fee, and taketh a wife, and enfeoffeth a stranger of the land, and the feoffee build thereupon a castle, or a mansion-house, *or other buildings*, or otherwise doth improve it, so as it is worth more by the year than it was in the possession of the husband, the wife shall not have Dower but according to the value it was at in the time of the husband. And yet, if a disseisor build upon land which he hath by disseisin, and the disseisee enter, he shall have the building, &c.; and so shall it be if the feoffee upon condition broken, &c. the difference is apparent."(*z*) [*256]

So, in the book of assize, we find that a woman demanded Dower of the third part of land, and the tenant said that he *bought* the land of her husband, not being built upon, and that he builded upon it, and she had judgment of the third part, *salvis edificiis;* and it is added with some inconsistency, and no damages, because the land was amended by building upon it.(*a*)

The reason for this is assigned in one of the books, because the heir is not bound to warrant except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable.(*b*)

*On the other hand, it is said, if a woman is entitled to have Dower of a marsh, and the *heir* by his industry makes it good meadow, she shall recover and have Dower as now it is, because the title is to the quantity of the land, and not to the value; but, if the heir hath improved it by building, or any collateral improvement, it is otherwise.(*c*) The latter point is, however, stated contrary by Lord Coke.(*d*) [*257]

(*y*) 1 Roll. Abr. 683. See however 12 E. 4. 2; Bro. Dow. 72. contra.
(*z*) Perk. sec. 328 (cites M. 17 H. 3. 192;) and see 30 E. 1. Dow. 81.
(*a*) 14 Ass. 12.
(*b*) Hargr. Co. Litt. 32. *a.* n. (8) (cites 1 H. 5. 11. 17 E. 3. 17 H. 3. Dow. 192. 31 E. 1. Vouch. 288.)
(*c*) 13 H. 3. Dow. 292; Co. Litt. 32. *a.*; Plow. Qu. 46.
(*d*) Co. Litt. 32. *a.*

It is probably difficult to find any satisfactory reason for the distinction. A house erected upon another man's land, becomes attached to, and parcel of the freehold, and ensues the title of the land; and if it shall go with the land to the person *absolutely* entitled thereto, it is not easy to understand why it shall not also become subject to particular interests in the land. The understanding of the profession, the author believes to be, that the wife shall be endowed of the land as she finds it at the time of her title of Dower consummated, and the succeeding passage in Perkins is strictly consonant with that proposition, viz.

"But if a man seised of land in fee, upon which there is building, that by reason thereof is worth 4*d.* more by the year, and he taketh a wife, and enfeoffeth a stranger, who takes down the building, and the feoffer dieth, the wife shall have Dower according to the value of the land, as it was at the time *of the death of the husband*, and hath no remedy for the taking away of the building before the death of the husband, notwithstanding that the building was upon the same land in the
[*258] possession of the husband *during the coverture; for the wife hath not right to have Dower before the death of the husband. *Tamen quære* of this case."(*e*)

So also it is stated by Coke, that "if the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband."(*f*)

In the late case of Stoughton v. Leigh,(*g*) it was the opinion of the Court of Common Pleas, that where a husband is seised of lands wherein there are mines open and wrought in his life-time, the sheriff must estimate the annual value of the open mines, as part of the value of the estates of which the widow is dowable. No authority was referred to for this opinion, and it may perhaps be considered as encountered by a passage in Chief Baron Gilbert's Tract on Dower, which was not adverted to in the argument. The passage is as follows. "If the wife, after the assignment of Dower, do improve the land, and make it better than it was at the time of the assignment, an admeasurement does not lie of that improvement. 14 H. 3. Admeasurement 10. 13 E. 1. *ibid.* 17; but if the improvement be by casualty, as a mine of coals, or of lead, which are in the land, &c. which have been occupied in the hus-
[*259] band's *time, the doubt is the more; but she shall not dig new mines, for that would be waste. The distinction touching the mine seems to be this, that where a mine is not open, she cannot work it at all, because it will be waste; if it be open, and in work, it seems to be only *a casual profit;* and a casual profit shall not avoid an assignment, or be so admeasured as to vacate it, since it is not certain to continue during the life of the dowress; and therefore *not to be computed into the value of that part which she possesses,* unless the value was co-extensive [in point of duration] with the estate which she is to have in it."(*h*)

(*e*) Perk. sec. 329. In 14 H. 4. 33, it is made a query if the heir decay the land, tenements, or houses, if the wife shall be endowed in the land according to the value when it was in the possession of her husband, or shall have the third part as it is, and have allowance for the improving. See also Plowd. Qu. 46.

(*f*) Co. Litt. 32. *a.*; (cites 30 E. 1. Vouch. 298.)

(*g*) 1 Taunt. 402.

(*h*) Gilb. Dow. 390.

In Hoby v. Hoby(*i*) (1683), the subject seems to have been viewed in much the same light as it was in the later case of Stoughton v. Leigh. In that case the tenant came into equity to be relieved against an assignment of Dower by the sheriff, charging fraud and collusion, and that there had been assigned to the defendant for her Dower one full third part of the lands, which amounted to 300*l.* per annum; and that in this third part there was a coal work, which one year with another was worth 300*l.* per annum beyond all charges, and yet no consideration was had of it in the assignment of Dower. It appears from the Register's book, that the court proposed to the parties that the defendant should either take 300*l.* per annum, the sum originally proposed to be settled on her by articles before marriage, or that she should work all the coal-pits, and dig coals, as well on the plaintiff's land, as the land assigned the defendant in Dower, and to take a third penny thereof, or else a new writ of seisin on the judgment in Dower should be issued to [*260] the sheriff, to divide the lands into three parts, and to choose by lot; the defendant thereupon consented to accept a third penny of the clear profits of the said estate, provided she might have it allotted to her out of the lands and coal-works already allotted her in Dower, which not being opposed on the part of the plaintiff, was so decreed, and the defendant was to be at liberty to break or make any new mouths to the said coal-pits, in any part of the plaintiff's lands, not assigned, or any part of the lands assigned her in Dower, and to work the same as she should think fit, and should at any time sink pits, work, dig, and carry away coals in and from any part of the plaintiff's lands, not assigned in Dower, as well as in what lands are assigned, the defendant in Dower allowing and accounting to plaintiff two-third parts of the clear profits, and the defendant was to have an allowance of 40*l.* per annum out of the plaintiff's two-thirds of the profits to repair the mansion-house.(*k*)

What weight would have been allowed to the proposition of Gilbert, in the particular case of mines, if that authority had been adduced to the court in Hoby v. Hoby, and Stoughton v. Leigh, it is not for the author to determine; but from the language of the certificate in the latter case, it may be gleaned as the impression of the court, that in assigning Dower by the sheriff, the one-third of the widow is to be ascertained by reference to a general estimate of the annual value. The purposes of substantial justice may propably be better consulted by the adoption of this principle, than by a strict adherence to the old rule requir- [*261] ing the sheriff to assign a third part of each denomination of property; but, as the authorities on this head were not brought before the court in Stoughton v. Leigh, that case can hardly be considered as overruling the more ancient decisions, particularly as the judges expressed themselves as declaring their impressions of what the existing law was, rather than as promulgating any new exposition thereof.

It seems that a rent may be reserved for equality of Dower, if the thing assigned be of greater value than the dowress ought to have. But it is added, that this cannot enure as a reservation, if the wife in another clause of the deed makes a grant of a rent without any mention in the deed that the thing is of greater value.(*l*)

(*i*) 1 Vern. 218. 2 Ch. Ca. 160.
(*k*) Reg. Lib. 1683. A. f. 256.
(*l*) 17 E. 3. 10.

In some cases, the widow may be put to her election to take her Dower out of one or the other of different estates on which she is dowable, and will be restrained from demanding Dower of both. Thus, if a man seised of one acre in fee, takes a wife, and exchanges the same acre with a stranger for another acre of land, and the exchange is executed, and the husband dies, the wife has a title of Dower upon both acres, but she must elect to have Dower either of the acre which the husband gave in exchange, or of the acre which he took in exchange, and she shall not have Dower of both.(*m*)

[*262] *Some other cases of election have been noticed in a preceding chapter.(*n*)

2dly. Of assignment contrary to common right.

An important distinction prevails between an assignment of Dower made by the sheriff, in pursuance of a judgment at law, and a voluntary assignment made by the heir or grantee. In the former case, the rules of law as to the modes in which Dower shall be assigned according to the particular nature and circumstances of the property, are to be strictly pursued,(*o*) for although the wife should consent to take her Dower in some other manner than that due of common right, yet the sheriff cannot bind the heir or tenant,(*p*) whose assent to an assignment against common right is as necessary as that of the wife; but on a voluntary assignment by the heir or terre-tenant, the parties may, by mutual agreement, waive a strict assignment according to the rules of law; and make such arrangement for the mode of enjoying Dower, as they think fit.(*q*)

Thus, the heir may, on the acceptance of the widow, assign one manor in lieu of a third part of each of three manors;(*r*) he may assign an un-

[*263] divided *third part in common, in lieu of a third part in severalty.(*s*)

And, in an assignment by the heir or terre-tenant, parcel of the thing to which the woman has right of Dower may be assigned unto her in the name of Dower, and it is not necessary that the third part of the thing unto which she hath right of Dower should be assigned unto her, for if the fourth part, the fifth part, or the moiety, is assigned unto her in the name of Dower for all the freehold which her husband had, and she agrees thereunto, it is a valid assignment.(*t*)

So also lands in Wales may be assigned unto a woman in allowance of all the freehold of her husband; and by this assignment she shall be

(*m*) Co. Litt. 31. *b.*; F. N. B. 149 (N.); Perk. sec. 319 (cites M. 23 E. 3. 130. M. 13 H. 3. Dow. 93); 3 Leon. 271.

(*n*) Supra, p. 239.

(*o*) Booth v. Lambert, Styles, 276; Perk. sec. 414; 12 E. 4. 2; but see 18 H. 6. 27, contra.

(*p*) See Perk. sec. 332; but see Anc. Entries, Qua. Imp. 529. 10; and Qua. Imp. in Dow. 1. contra.

(*q*) See Styles, 276, in Booth v. Lambert; 12 E. 4. 2 *b.* 26 Ass. 41. 1.

(*r*) 1 Roll. Ab. 683. 4.

(*s*) Coots or Booth v. Lambert (1651,) 9 Vin. Ab. 682; Styles, 276; Co. Litt. 32. *b.* n. (1); and see also Rowe v. Power, 1 Bos. and P. N. R. 1; and Perk. sec. 413, who makes a quære on the point.

(*t*) Perk. sec. 405. But it is said that *all* the land of the husband cannot be assigned in the name of dower. Ib. sec. 408.

excluded to demand Dower of any other lands which her husband had within any place in England.(*u*)

On assignment by the sheriff, a rent issuing out of the land cannot be assigned in lieu of Dower of the land, for such assignment is against common right, and the sheriff cannot charge the land with the rent, but only he who is owner of the land;(*v*) but such an assignment by the heir is good enough, if the widow assent.(*w*)

*So it is said, 6 Eliz. that in Dower, acceptance of quarters of corn during life is a good bar, as of acceptance of rent; otherwise of an horse, and such things as do not arise from the land.(*x*) [*264]

But an assignment of rent or other thing in recompense of Dower, cannot have a condition annexed to it, but such condition will be merely void; for the rent comes in place of the Dower of the land, and ought to be of the same nature, viz. absolute.(*y*) And such rent cannot be for a less estate than the life of the dowress.(*z*)

Nor can lands or tenements, or rent issuing out of lands or tenements, of which a woman is not dowable, be assigned unto her in the name of her Dower, in allowance of other lands or tenements, whereof she is dowable.(*a*) The reason of this is, that a right to an estate of freehold cannot be barred by the acceptance of any collateral recompense *in pais*;(*b*) and therefore such an assignment would not conclude the wife from claiming her Dower of the other lands, which is what is to be understood by the proposition.

If Dower be assigned of the land, excepting the trees growing upon the land, this is a void exception; *and, if Dower be assigned upon condition, the condition is void, for the dowress is in by her husband, and the party making the assignment, which merely ascertains the certainty of the parcels, cannot qualify her estate or deprive it of its incidents.(*c*) [*165]

II. What persons, in respect of interest in the land, are competent to make a valid assignment of Dower *in pais*, namely, when it is not assigned by the sheriff, or commissioners, upon suit.

The assignment of Dower in certainty being an act involving the interests of the persons entitled to the inheritance, it became requisite that no one should be legally competent to assign Dower, who had a less estate than one of freehold. As no tenant of an inferior nature was capable of binding the rights of the freeholder in a real action, and con-

(*u*) Perk. sec. 409 (cites P. 7 E. 3. 9. Dow. 103;) Jenk. 41. pl. 88. So of lands in Ireland. Arg. Cart. 187.

(*v*) 22 E. 4, cited Noy. 10; but see 20 Ass. 41, contra.

(*w*) Jenk. Cent. 1. ca. 17; 1 Roll. Abr. 683; Bro. Dow. pl. 61. And it seems, such an assignment is good even after judgment for dower, and it shall be a good bar in a *scire facias*. Perk. sec. 410 (cites E. 31 E. 3. Sci. fa. 99;) and see Dy. 91. *a*.

(*x*) Moor. 48. [59. pl. 167.]

(*y*) See Wentworth v. Wentworth, Cro. Eliz. 452; Noy. 55; and see 1 And. 288.

(*z*) Hob. 153.

(*a*) Perk. sec. 407, 410; Co. Litt. 34. *b*. 534. *b*.; Dy. 91. *b*.; Bro. Dow. pl. 61; but see Harg. Co. Litt. 34. *b*. n. (9), that if the heir assigns dower of lands of which the husband was seised, but the wife was not dowable, she is tenant in dower. *Sed qu.*

(*b*) 4 Co. 1. *b*.

(*c*) Colthirs tv. Bejushin, Plow. Com. 21; Law of Baron and Feme, p. 105; Co. Litt. 34. *b*.

sequently, as judgment obtained on a writ of Dower brought against a person having merely a chattel interest, would be voidable by the freeholder, the consistency of the law required that such person should not bind the freeholder by assigning Dower without action. A person having only a chattel interest is not entrusted with the defence of the inheritance, and the freeholder might possibly have had a good bar to allege to the claim of Dower. The propositions are indeed conversible, that against whomsoever a writ of Dower will lie, that person is com-

[*266] petent to make a valid assignment, or in other words, whoever is *compellable by writ to assign Dower may do it without writ.

It will accordingly be found in the books that an assignment of Dower by a guardian in socage, a tenant by elegit, statute staple, or statute merchant, or a lessee for years, is not good.(*d*) An exception to this doctrine existed formerly in the case of a guardian in chivalry, founded upon reasons which it is no longer of practical importance to inquire into.(*e*)

But an assignment made by a disseisor, abator, intruder, or other person having the freehold by wrong, may, and in most cases will, be good, and binding upon the persons having right.(*f*)

In inquiring into the competency of different persons to make a valid assignment of Dower, it is a material circumstance, and very necessary to be borne in mind in consulting the old cases, that different degrees of capacity are required for the different modes of assigning Dower.

Dower is assignable, as it has been already shown, either according to common right, or specially, and against common right. An assignment of Dower *according to common right*, if made by a person pos-

[*267] sessed of the freehold by right or by wrong, is binding both upon the wife, and upon all persons *having interests in the lands assigned:(*g*) an assignment *against common right* is binding upon neither further than they are agreeing thereto, and therefore such an assignment, if made by a person having only a particular or defeasible interest in the inheritance, though valid during the continuance of his interest, if accepted by the wife,(*h*) is not binding upon his successors, or other persons having title; nor if made by the heir, is it binding upon persons having charges or other interests in the land, although created subsequent to the attachment of the title of Dower.(*i*) Thus if a disseisor, abator, or intruder assign *a rent* unto a woman in allowance of her Dower of *the land*, the disseisee, or he who has right unto the land, shall not be bound by such assignment.(*k*) And if a tenant in tail

(*d*) Perk. sec. 404. Co. Litt. 35, *a*. 6 Co. 58. 19 Ass. 68. A quære is made as to a guardian in socage in 1 Roll. Abr. 682.

(*e*) See Co. Litt. 38, *b*. Perk. sec. 403. 9 Co. 17. 6 Co. 58. Bract. 314.

(*f*) Co. Litt. 35, *a*. 357, *b*. 2 Co. 67. 6 Co. 58. Perk. sec. 394. 12 Ass. 20.

(*g*) Perk. sec. 404, and see sec. 426, that if a disseisor assign dower [according to common right] and the disseisee enter upon the tenant in dower, she may have an assize against him.

(*h*) See 2 Bos. and Pul. N. R. 33, in Rowe v. Power.

(*i*) See p. 241, supra.

(*k*) Perk. sec. 398, (cites 7 Ass. 41. E. 10 E. 2. Dow. 189.) Jenk. Cent. 1. ca. 17.

assign an *undivided* third part of the lands in Dower, it is good only during the continuance of his interest.(*l*)

On the same principles an assignment by one of several jointenants, if according to common right, is a good assignment, and shall bind his companions; *but if against common right, they shall [*268] not be bound by it,(*m*) and the law is the same of an assignment by a husband seised in right of his wife.(*n*) For the complete validity of an assignment *against* common right, it is necessary that there should be the agreement of all parties who may be prejudiced by it. But if made by a person having the fee, he is of course competent, in regard of his unlimited ownership, to bind all persons claiming under him.

The consequences of these distinctions have been already traced in the preceding portion of this chapter.

On the general principle that whoever is compellable to assign Dower by writ, may assign Dower *in pais*, an assignment made by an infant is good; for, as it will be seen in the following chapter, the parol shall not demur for non-age in a writ of Dower.(*o*)

It would seem from one passage, that if Dower be assigned by a person not legally competent, as by a guardian, the heir may treat the wife as a disseisor, and he may have an assize.(*p*)

But it is held that the assignment is not merely void, but shall stand good until avoided.(*q*) So also of an assignment made by a person legally competent *to assign Dower, but of a thing [*269] of which the woman was not dowable.(*r*)

Although an assignment of Dower by a disseisor, abator, &c. is, generally speaking, good, it is otherwise if it is procured by the covin of the wife; as if she cause another to disseise the tenant, and recovers Dower against, or has Dower assigned by him.(*s*) From the abhorrence of the law to covin, it refuses to recognise a recovery obtained by it, although upon a rightful title: and the heir may treat her as a disseisor, she having made herself a party to the disseisin.(*t*)

Although no estate is vested in the dowress until the certainty of the land is ascertained by assignment, yet as the estate, although suspended in the meantime, does not *pass* by the assignment, but the dowress is in, in intendment of law, by her husband, neither livery nor writing is essential to the validity of an assignment.(*u*) In the very learned reasons for the appeal in Rowe v. Power, drawn up by Mr. Hargrave, it was contended that this was only true as applicable to assignments

(*l*) See Rowe v. Power, 2 Bos. and Pul. N. R. 11. But it has been said that if a tenant in tail assigns a *rent* out of the land in lieu of dower, this shall bind his issue, unless it amounts to more than a third part. Per two judges in Bickly v. Bickly. 1 And. 288.

(*m*) Perk. sec. 397, (cites E. 7 H. 6. 3. 4. Dow. 2.) 2 Co. 67. Co. Litt. 34, *b*. 35. *a*. Bridg. 130.

(*n*) Perk. sec. 399, (cites E. 10 E. 2. 4. 139.) and see Hargr. Co. Litt. 35, *a*. n. (2.)

(*o*) 9 H. 6. 6, *b*.

(*p*) 19 Ass. 68. Gilb. Dow. 387. Such at least seems to be the inference. See also Plow. 51. 54. F. N. B. 148, note (a.)

(*q*) Perk. sec. 403, and see 1 And. 288.

(*r*) Perk. sec. 404.

(*s*) 18 H. 8. 5. 19 H. 8. 13. 44 E. 3. 46. 11 E. 4. 2. 15 E. 4. 2. 7 H. 7. 11. Plow. 51, 54. Perk. sec. 394, 395. Jenk. Cent. 4. ca. 98.

(*t*) 11 E. 4. 2.

(*u*) Co. Litt. 35. *a*. 2 Bos. and Pul. N. R. 34, in Rowe v. Power.

according to *common right*, and that even a tenant in fee could not, by mere agreement with a widow, and without livery, pass a legal estate in Dower to her by assigning an *undivided* third, that being against
[*270] common *right. It was therefore contended, that an assignment of Dower in the form of an undivided third by a *tenant in tail* solely seised, and accompained with livery, was nothing more or less than a lease or feoffment for life by tenant in tail, not warranted by the enabling statute of the 32d of Henry the eighth. This argument is negatively opposed by the current of authorities in the old books assuming an assignment against common right by parol to be valid,(*v*) and it meets with but little support from principle. The law does not suppose that because a woman takes an *assignment* of Dower against common right she takes thereby any thing short of an *estate in Dower* properly so called, and if she takes an estate in Dower she must take it as an emanation from the estate of her husband, and not as a freehold created *de novo* by the heir. All the books testify that if a woman accepts an assignment of Dower by word against common right, *she* is bound by it, and cannot afterwards demand her Dower to be assigned to her in the strict manner. Now if such assignment against common right was to be considered merely as *a grant* by the heir in satisfaction or allowance of her Dower, such grant could not be a bar to her, for the right to an estate of freehold cannot be barred by a collateral recompense.

It will indeed be found from the books that even a rent assigned in
[*271] allowance of Dower of land or *a capital messuage is good without deed,(*w*) which plainly shows that it is considered as coming in lieu and in the nature of Dower. And such rent must be pleaded by the word *assignavit*, and not *dedit*.(*x*)

If the sheriff assigns Dower contrary to common right, when it might have been assigned regularly, it seems that this is error in the execution and may be taken advantage of by the tenant as such.(*y*) It is however said by Doddridge, J. in another case, that if the sheriff commit error by assigning a larger part than he ought, a writ of admeasurement lies, but not error, inasmuch as the judgment and award of execution are good.(*z*) It is, however, very doubtful whether the writ of admeasurement lies in this instance; and the writer does not believe that any precedent for it is to be found; but it is said that if on a recovery of the third part in Dower the sheriff assigns a moiety, &c. the tenant has remedy against the sheriff by assize, or he may have a *scire facias* to
[*272] assign *de novo*.(*a*) In one case it seems the sheriff *was committed for an improper assignment of Dower, as where

(*v*) It was admitted in the reasons for the appeal that the case of Coots v. Lambert supra, p. 263, was an authority to the contrary, but the plaintiff in error claimed, if necessary, to controvert that case.

(*w*) 12 H. 4. 176. 7 H. 6. 33. *b*. Jenk. Cent. 1. ca. 17. Hob. 153. Perk. sec. 406. And upon an assignment of part of the lands in dower, the heir by parol may assign away through the other parts. White v. Robinson, 2 Roll. Rep. 475.

(*x*) Cro. Eliz. 452.

(*y*) Styles, 276, in Booth v. Lambert. As to error in the return, see Howard v. Mansfield, Palm. 264.

(*z*) Palm. 266, in Howard v. Mansfield.

(*a*) Bro. Extent. pl. 13. F. N. B. 138, note (b.) (cites 22 R. 2. Execution, 165. 21 H. 7. 29.) Gilb. Uses. 388. The writ of admeasurement, however, lay on downment by the king in Chancery. F. N. B. 149, (A.)

he returned that he had assigned to the demandant, for her Dower of a house, the third part of each chamber, and had chalked it out for her.(*b*) In another case, the sheriff was committed for taking 60*l.* to execute his writ of execution, and the court ordered that the assignment of Dower being under value, should be amended.(*c*)

It seems also that a court of equity will entertain a bill to be relieved against a partial assignment of Dower by the sheriff, and that that court may direct a new writ of seisin to the sheriff, and even order him to divide the lands into three parts and to choose by lot.(*d*) In the particular case from which this doctrine is gleaned, the assignment was charged to be fraudulently done, and besides the excess of value, it appeared that the dowress's own father was the only person that, on behalf of the infant children, defended the writ of Dower, and appeared to see the same set out, which was relied on as looking like a collusion. The case of Sneyd v. Sneyd(*e*) affords another instance of an assignment by the sheriff being set aside in a court of equity on a bill charging partiality and excess.

In every case where Dower is recovered by judgment, the assignment is at this day made by the sheriff,(*f*) unless the parties previously agree upon a *division. In all cases where it is [*273] set out by agreement, it is certainly advisable to have a written instrument to ascertain the lands.

The course pursued by the Court of Chancery, on the title of Dower being established or admitted, appears to be to appoint a commission to set out the Dower, and to decree the heir to assign accordingly;(*g*) but it appears in one case that it was ordered to be allotted by the master, and the dowress to be let into possession.(*h*) In a case where the defendant in his answer said that he had offered to assign her Dower to the plaintiff, and to pay one third of the rents and profits from the time to come, Lord Loughborough said he should think upon that case, if there were any difficulty, that upon the view of the answer, a commission would hardly go to set it out; but that it would proceed upon the confession in the answer.(*i*) Under a decree, the dowress can of course only have an equitable title till assignment by the heir in pursuance of the decree.(*k*)

Of the writ of Admeasurement of Dower, a remedy now nearly obsolete, the following account is given by Chief Baron Gilbert.

"The writ of admeasurement of Dower lieth where the heir, when he is within age, endoweth the *wife of more than she ought to have Dower of, or if the guardian(*l*) endoweth the wife of [*274] more than one third part of the land of which she ought to have Dower, then the heir at full age may sue this writ against the wife; and thereby

(*b*) Abingdon's case, cited Palm. 265. (*c*) Longvill's case, 1 Keb. 743.
(*d*) Hoby v. Hoby, 1 Vern. 218. (*e*) 1 Atk. 442.
(*f*) As to assignments (now obsolete) by the escheator, see F. N. B. 263.
(*g*) See Lucas v. Calcraft, 1 Bro. C. C. 134, and per Lord Loughborough in Mundy v. Mundy, 2 Ves. J. 125. Megott v. Megott, 2 Dick. 794. Huddlestone v. Huddlestone, 1 Ch. Rep. 38.
(*h*) Goodenough v. Goodenough, H, 1772. 2 Dick. 795.
(*i*) Mundy v. Mundy, 2 Ves. J. 129. (*k*) See 7 Mod. 43.
(*l*) This means guardian in chivalry. The guardian in socage cannot assign dower. See p. 266, supra.

she shall be admeasured, and the surplusage she had in Dower shall be restored to the heir: but in such case there shall not be assigned anew any lands to hold in Dower, but to take from her so much of the lands as surpasseth the third part whereof she ought to be endowed; and he need not set forth of whose assignment she holds. 17 Ed. III. 66. A view is not grantable on this writ. 17 Ed. III. 67, cont. adjudged 18 Ed. III. 3. 20. and it seems that the heir within age, shall [not] have an admeasurement of Dower of his own assignment. 7 E. III. Admeasurement B.;(*m*) but if the heir at full age assigns Dower, he shall not have this writ against his own assignment. 6 H. III. Admeasurement 18.

"And if the heir within age, before the guardian enters into the land, do assign to the wife more land in Dower than she ought to have, then the guardian shall have the writ of admeasurement against the wife, by the stat. of West. 2, c. 7, and if the guardian brings the writ, and does pursue it against the wife, yet the heir at his full age, by the same statute, shall have the writ of admeasurement of Dower against the wife."(*n*)

[*275] *Every assignment of Dower by the heir, or by the sheriff on a recovery against the heir, implies a warranty; but this warranty is special, namely, that the tenant in Dower being impleaded by one who has title paramount, shall vouch, and recover in value not according to that which she hath lost, but a third part of the two remaining parts of the land whereof she is dowable.(*o*) And if it is but a particular estate which is recovered against the dowress, and which determines in her life-time, she may re-enter into her original Dower, and then it seems the heir may enter into the second Dower, for she shall not have both.(*p*)

The books are at variance whether this implied warranty arises only in respect of the privity between the dowress and the heir, or extends also to an assignment by the alienee of the husband or of the heir. In one case it is said that a feme endowed by the vendee of the baron may vouch the vendee, for cause of her endowment, and the reversion in him.(*q*) But the current of authorities appears to be otherwise. In Bedingfield's case(*r*) it is said, "There is a greater privity when a wife is endowed of the immediate estate which her husband's heir has by descent,

[*276] than when she is endowed by a *stranger, or of another estate; for if the wife be endowed of the immediate estate, descended to her husband's heir, if she be after impleaded, she shall vouch the heir, and shall be newly endowed of other lands which the heir has; but if the wife be endowed by the husband's or heir's alienee, if she shall be impleaded, she shall not vouch the alienee to be newly endowed; and that is the reason that when a woman brings a writ or Dower against the alienee of the husband, &c. and he vouches the heir,

(*m*) Quære 7 Ed. 2. Admeasurement 13.

(*n*) Gilb. Uses, 379, where see more of this writ and of its form and the process thereon, and also F. N. B. 148.

(*o*) Bro. Dow. pl. 79, (cites M. 5. E. 3. and Fitz. Vouch. 249.) Co. Litt. 384, *a.* (cites 4 E. 3, 36. 33 E. 3. Cont. de Vouch. 122. 43 Ass. 32. 50 E. 3. 7.) F. N. B. 149, (M.) 4 Co. 122. Perk. sec. 419; but see 9 Co. 18, where it is said that she shall be newly endowed of other lands which the heir has, generally.

(*p*) Bro. Dow. pl. 79, (cites ut supra.)

(*q*) Roll. Abr. 743.

(*r*) 9 Co. 18.

the demandant may witness that the heir has lands descended to him in the same county, (for the original doth not extend to another county,) and pray that she may be endowed of his estate, and that is for the benefit of her voucher to be newly endowed. Vide in 4 E. III. 36, b. and 6 E. III. 11, a, b. The tenant in a writ of Dower vouched the heir of the husband, and the demandant testified that he by descent, &c. in the same county; and judgment was given against the heir if he had, and if not against the tenant.(*s*) In 6 E. III. 20, b. the wife of a stranger brought a writ of Dower, and the tenant vouched the heir,(*t*) &c. the demandant shall not recover against the heir, because there wants privity. In 18 E. III. 36, b. in Dower, the tenant vouched, and the vouchee vouched the heir of the husband of the demandant, the demandant testified that the heir had assets by descent in the same county, the demandant shall not recover against the heir, but against the tenant only, for there is *not immediate privity betwixt the demandant and the heir, for the demandant shall recover against the heir only when the tenant in demesne vouches him. Vide Regist. Judic. 15, 16 E. III. Dow. 56. 3 El. Dy. 202." [*277]

It seems, however, that if a woman is endowed by a disseisor, she shall have the warranty.(*u*)

It has been already observed that the effect of an assignment of Dower is to discharge the remaining lands from the title of Dower, except so far as there may be a lien upon them by reason of the warranty. But it has been doubted whether if there be three or four several feoffees of land of which a woman has right to have Dower, and one of them, by agreement with her, assigns parcel of his land unto her in allowance of *all* the freehold which belonged unto her husband, whether this assignment shall discharge the other feoffees against the dowress. It is supposed by Perkins that it shall; "but some (he adds) have said the contrary,(*v*) for they say that they cannot plead this matter against the woman in several writs of Dower brought by her against them, *tamen quære*. And the feoffee who made assignment cannot come into court and plead this matter in actions brought against the other feoffees, because he is a stranger unto those actions, and there is not any means to bring him into court."(*w*)

"If, however, a man seised of two acres in fee *takes wife, and enfeoffs a stranger of one of the acres with warranty, and dies, and *both acres are in one county*, and the heir doth endow his mother of his acre in allowance of all her Dower in both acres, it is a good assignment; for if the feoffee had been impleaded by the woman in a writ of Dower, he might have vouched the heir, and the demandant shall recover against the heir conditionally.(*x*) And if the heir leases for life unto a stranger parcel of the land which he hath by descent from his father, and doth assign unto his mother parcel of the land which he hath in possession in allowance of all her Dower, as well for the land leased as for the land which remaineth in his possession, the assignment is [*278]

(*s*) 2 Roll. Abr. 751. Dy. 202, pl. 71. Winch. 81, 88. Hutt. 71, 72.
(*t*) Quære, what heir?
(*u*) F. N. B. 149, note, (cites 7 E. 3. 7, 21 E. 3. 48, 10 E. 3. Quid juris 41.)
(*v*) See Co. Litt. 35, *a*. (*w*) Perk. sec. 402 (cites 3 E. 3. Dow. 76.)
(*x*) Perk. sec. 400, (cites M. 3 H. 6. 17.) Moor 25, 26. Co. Litt. 35, *a*.

good, and yet, if the woman implead the lessee by a writ of Dower, and he vouch his lessor, the wife shall not have judgment to recover against the heir, because he is not bound unto the warranty by his father, who was husband to the woman. Quære if in such case the lessee vouch the heir generally, and the heir enter generally into the warranty, then it seems that judgment shall be given for the demandant against the vouchee conditionally."(*y*)

It should be noticed as a point of possible occurrence, that where the wife recovers Dower, by writ, against a vouchee *conditionally*,(*z*) the lands of the tenant are not absolutely discharged from the title of

[*279] Dower, but may eventually be liable, and that *the lien of the judgment will follow the lands in the hands of an alienee. As in the following case: "If a man seised of two acres of land in one county take a wife, and enfeoffeth a stranger of one of the two acres with a warranty, and hath issue and dieth, and his issue entereth into the other acre, and the wife brings a writ of Dower against the feoffee, and he vouch the issue, &c., who loseth by default, and the wife hath judgment conditional, viz. to recover against the vouchee, if he, &c. and the demandant sueth execution accordingly, and she is put in execution of land which the vouchee hath by descent in the same county where the Dower is brought as heir to her husband, of which land she is dowable, and tenant holdeth in peace, and the vouchee is restored to the land which the wife recovered by a writ of deceit: in this case the wife shall have a *scire facias* against the feoffee who was tenant to the writ of Dower; and, notwithstanding that the tenant hath enfeoffed a stranger of the same land before the *scire facias* brought against him, yet his feoffee shall be bounden by the judgment given in the writ of Dower, because that the writ of Dower was given of the land conditionally, &c."(*a*)

It is also said, that if a woman having a title of Dower marries a second husband, and the issue of the first husband assigns the third part of the lands to his mother *by the agreement of the husband*, for her

[*280] Dower, in allowance of all the frechold which *his father was seised of; after the death of the second husband, she may refuse it, and be new endowed according to the value of the whole land which was in the possession of her husband during the coverture.(*b*) But it would have been otherwise if she had been endowed by the sheriff upon writ of Dower brought by her and her husband.(*c*)

We have already seen that, in consequence of the implied warranty, if the particular lands which are assigned to the wife in Dower by the heir are recovered against her by lawful title, her title of Dower on the remaining lands revives, and she is entitled to be new endowed of one third of those lands, although sold by the heir during the interval.(*d*) It would therefore seem that where a person selling lands relies upon an assignment of Dower of other lands, as discharging the lands sold from a title of Dower, and the lands assigned are held under a different title from those sold, the purchaser ought to be satisfied of the goodness

(*y*) Perk. sec. 401.
(*z*) See chap. 13, infra.
(*a*) Perk. sec. 421, (cites 43 Ass. pl. 32 M. 8 E. 2. Voucher 157. M. 3 E. 3. 50.)
(*b*) Perk. sec. 422, (cites H. 33 E. 1. Dow. 177, 2 Inst. 309.) Jenk. Cent. 2. ca. 56.
(*c*) Ibid.
(*d*) Perk. sec. 418, 419, and 420.

of the title to the lands assigned as well as to those sold. The practice, however, should the point arise, would probably be considered otherwise, governed by that with regard to the bar by jointures, the titles to which are never required.(*e*)

*In the case of Grigby v. Cox,(*f*) part of the plaintiff's bill appears to have been framed upon an idea that a purchaser [*281] of part of an estate which is subject to Dower has an equity to have the Dower turned upon the part remaining unsold, in discharge of the part purchased. In that case, the estate had been settled, on the marriage of the defendant and his wife, subject to the Dower of the mother, to the separate use of the wife, who appointed part to the plaintiff. He filed his bill to have the effect of this bargain, and also praying that he might be decreed to receive the rents and profits of this part of the estate free from the deduction of the mother's Dower. It does not appear from the report that the mother was a party of the bill. The observations of Lord Hardwicke on this part of the prayer of the bill are scarcely intelligible, and probably depend upon specialties of the case which the report does not develope. "As to the exoneration of this part of the lands from the mother's Dower (he remarked) by turning it on the other part of the estate, which still is settled to the separate use of the wife, that depends on the appointment of the wife, whether she was bound by that appointment to do so; for as to the covenant by the husband that it is free from Dower, that will not affect the wife; nor has plaintiff a title to that decree against her: but has a remedy against the husband. The power of the wife was under this settlement, which is made subject to the Dower, she being to receive the rents and profits to her separate use, over and above the Dower, which *ran over the whole. [*282] Then if the wife made an appointment, it was only over and above the Dower; the plaintiff then must rely on that covenant to indemnify and make him satisfaction."

In cases where the writ of Dower is brought against several purchasers, it seems that the court of Common Pleas will itself order that the sheriff shall charge them all proportionally, though otherwise he might have charged all out of one party, and the party could have no remedy at law.(*g*)

*CHAPTER XIV. [*283]

Of the REMEDIES *for the recovery of* DOWER *at law.*

A DOWRESS having no right of entry till her Dower is assigned, cannot, if an assignment is refused, maintain a possessory action. The legal remedy to enforce an assignment of Dower is by a writ of Dower *unde nihil habet*, or by a writ of right of Dower, brought against the tenant of the freehold; upon which, if she obtains judgment, Dower is assigned

(*e*) The student is advised to consult the discussion on this subject in Mr. Sugden's Treat. on Vend. and Purch. p. 304, 5th edit. and see Simpson v. Gutteridge, 1 Madd. 609.

(*f*) 1 Ves. S. 517.

(*g*) Anon. Freem. 227.

by the sheriff on the land; and she may then proceed to recover possession by ejectment.

In consequence of the jurisdiction which courts of equity have assumed, in modern times, of setting out Dower, the prosecution of a writ of Dower has become a matter of some rarity: Dower, however, being a legal right, can only be regularly tried at law; and therefore, whenever the *title* of the Dowress is disputed, upon a bill in equity for a commission to set out Dower, the plaintiff is sent to law to try her right, which can only be done by a writ of Dower; this writ therefore cannot be considered as obsolete.

The writ uniformly adopted when the circumstances will allow of it, is the writ of Dower, *unde nihil habet*,(*a*) which is a writ of right in its nature, *and lies in every case where no Dower has been already assigned by the tenant to the writ, within the vill wherein the lands lay of which Dower is demanded; but if she has received *part* of her Dower of the tenant himself, in the same vill, the proper remedy is the writ of right of Dower, which is a more general writ, extending either to a part or to the whole; and is, with respect to the claim of Dower, of the same nature and efficacy as the grand writ of right, respecting a claim to an estate in fee simple.(*b*)

[*284]

Before the abolition of wardships, if the lands were held of the king *in capite*, and the heir was in ward, the only mode by which the widow could obtain an assignment of Dower was by suing the king, as guardian, in the Chancery, or, as is said by some, in the Court of Wards.(*c*) The whole of the proceedings in this case (now obsolete) will be found in Fitzherbert's *Natura Brevium*, 263, and Gilbert's Tract on Dower, 412.

*To collect all the points upon the writs of Dower would swell this volume to an immoderate bulk, and at this day would scarcely be considered as an accomplishment of any value. The following outline, with the help of the references, will probably be sufficient for most purposes of practical research.

[*285]

I. Against whom this writ will lie.

It has been already stated that at this day the writ of Dower lies against no one but the tenant of the freehold.(*d*) Therefore it cannot be brought against the guardian in socage,(*e*) or any person who has but a chattel interest, as a tenant by elegit, tenant for years,(*f*) &c. And it seems that although judgment and execution should be had against such a tenant, yet he may afterwards enter upon the demandant.(*g*) And the tenant of the freehold, before judgment, shall be received; and upon

(*a*) See the form of this writ and the process thereon in Fitz. N. B. 147. (E.) Booth Re. Act. 166. Rast. Ent. 227. b. Reg. 170. a. Gilb. Dow. 375. 2 Saund. 42. *m.* where the whole course of the process upon a writ of dower is detailed with great accuracy in a note by the learned editor. There is a special writ of dower of lands or tenements in London, directed to the mayor and sheriffs. See Fitzh. N. B. 148. (Gilb. Dow. 378. and see 1 Vent. 267. Raym. 233. Co. Ent. 176. *b.*

(*b*) Gilb. Dow. 374. 367. F. N. B. 18. (C.) Kel. 128. Booth Re. Act. 166. 118. (cites Registr. 3.) St. Westm. 1. c. 49. 2 Inst. 261. This writ lies for dower of the profits of an office. Fitz. N. B. 8. H. For the form of the writ and process, see Booth Re. Act. 118. Reg. 3. a. Rast. Ent. 234. Fitz. N. B. 7. (E.) Gilb. Dow. 357.

(*c*) Smith v. Angel, 2 Raym. 785. and 7 Mod. 43. Jenk. Cent. 1 ca. 17. Dy. 228. b. 263. pl. 36. 2 Inst. 270. Keilw. 133. b.

(*d*) Supra, p. 265.

(*e*) 29 Ass. 68. Bro. Dow. pl. 63.

(*f*) 9 Co. 17.

(*g*) Mitchell v. Hyde, 1 Leon. 92.

default of the tenant to pray to be received, yet he may falsify after judgment.(*h*) So also the reversioner may be received to save his title, where the writ is brought against the tenant for life.(*i*)

II. As to the process in this action.

The process is by summons to appear, and if the tenant neglects, or does not cast an essoign, then by grand cape and petit cape in the Common Pleas.(*k*) *On the return of the writ of summons, the tenant's attorney may enter appearance with the filazer, and [*286] pray view, &c. Then passes in some cases a writ of view, whereby the sheriff is to show the tenant's land, and on return the tenant's attorney takes a declaration, and generally pleads *ne unque seisie*, &c.(*l*)

If the tenant neglects to appear on the return of the grand cape, the demandant is strictly entitled to judgment of seisin and to an award of a writ of inquiry of damages; but if the tenant appear on the return of the grand cape, the demandant, instead of insisting on final judgment against the tenant for his default to the summons, may waive the default and take an appearance upon the grand cape, and so in a petit cape.(*m*)

The jury process in this action is the same as in personal actions in the Common Pleas, viz. a *venire facias*, and a *habeas corpora juratorum*.(*n*) And by stat. 24 Geo. II. c. 48, sec. 4, it is enacted, that in all writs of Dower *unde nihil habet*, after issue joined, it shall not be needful or requisite to have above fifteen days between the teste and return of the *venire facias*, or any other process to be sued out for the trial of the said issue, but that the writ of *venire facias* *and [*287] other process after issue joined until judgment be given, having only fifteen days between the teste and return thereof, shall be good and effectual in law, as is used in personal actions."

III. With regard to the pleadings.

To this writ the tenant may plead in *abatement* of the demand, as

Non tenure either of the whole or part.(*o*)

That he holds jointly with A. not named.(*p*)

And in these cases, as the writ of Dower *unde nihil habet*, is a writ *de libero tenemento*, generally, and not, like a *præcipe quod reddat*, a demand of a certain number of acres, if the plea is only as to part, the demandant may abridge or narrow her demand to the residue,(*q*) and the writ will remain good, for the abridgment does not falsify it, as it would the *præcipe quod reddat*.(*r*) And the demandant may abridge her demand although the tenant does not plead in abatement.(*s*) But it is said that if the writ is *de libero tenemento* in D. and S. there can be no abridgment as to all the lands in either of the vills named.(*t*)

(*h*) Anon. Brownl. and Goldsb. 126. (*i*) Ibid.

(*k*) F. N. B. 148. (D.) Fitz. Dow. 48. 2 Saund. 43. n. (1.) As to the essoign in dower, see 9 Co. 16. Com. Dig. Pleader. (2 Y. 1.)

(*l*) Bull. N. P. by Bridgman. 119. n. 2 Saund. 44. n. (3.) (4.) where it is doubted whether the view would be allowed. Com. Dig. Pleader. (2 Y. 3.)

(*m*) Staple v. Hayden, 1 Salk. 216. 6 Mod. 4. 2 Saund. 43. n. (1.)

(*n*) See Dennis v. Dennis, 2 Saund. 330. Robins v. Crutchley, 2 Wils. 121.

(*o*) Rast. Ent. 231. a. b. 232. b. 1 Bro. Ent. 205. Clift. 303. pl. 11. Rob. Ent. 246. 1 Lutw. 716, 717. And see Mitchell v. Hyde, 1 Leon. 92, and 2 Saund. 44. n. (4.) Moor, 80. Dal. 100.

(*p*) Rast. Ent. 225. b. (*q*) Lev. Ent. 76. 3 Lev. 68. Herne, 342.

(*r*) 14 H. 6. 3, 4. Bro. 'Abridgment,' pl. 12.

(*s*) See 2 Saund. 339. (*t*) 3 Lev. 68.

Ancient demesne.(*u*)

[*288] *That the demandant married pending the writ.(*v*)

The pleas *in bar* which the tenant may use in this action are either such as deny the right of the demandant to any Dower at all, or such as admit her title, but allege some reason why she should not be permitted to recover her Dower.

Of the former kind are the pleas of

Ne unques seisie que Dower, which alleges that the demandant's husband was never seised of such an estate in the lands that she can have any legal claim to be endowed of them.(*w*) In what cases the tenant may support this plea will be found from a reference to the third and fourth chapters of this work.

Ne unques accouplè in loyal matrimonie.

By this plea the tenant controverts the validity of the demandant's marriage with the person of whose lands she claims Dower.(*x*)

To this plea the demandant must reply that she was married at B. in such a diocese, and a writ shall be sent to the bishop of that diocese requiring him to certify the fact to the court.(*y*)

[*289] *And if the court in which the demand of Dower is made is an inferior jurisdiction, which cannot write to the bishop, as if the action be brought in the Hustings Court of London, or any other corporation, the record must be removed, to have it tried, to a superior court which can write to the bishop, and upon return of the bishop's certificate the record is to be remanded, as in a foreign voucher.(*z*)

But if the marriage was celebrated in Scotland, where there is no episcopal establishment, the fact must of necessity be tried by a jury, and therefore the replication should conclude to the country, and the issue will be tried in the county where the venue is laid.(*a*)

But in any other case than that of a marriage in Scotland or some foreign country, it seems that a replication to the plea of *ne unques accouplè* concluding to the country is bad, for it goes to oust the bishop of his jurisdiction.(*b*) Neither can the demandant reply a sentence in the ecclesiastical court, declaring the marriage valid, for that is only matter of evidence, and no estoppel; and the bishop is the proper judge whether, as evidence, it is conclusive on him.(*c*) But if the bishop has al-

[*290] ready certified the marriage to the court, that certificate may be *replied by the demandant, and shall be a good estoppel

(*u*) 1 R. A. 322. (E.) pl. 2. Rob. Ent. 250. Ash. Ent. 297.

(*v*) Co. Ent. 173, *b*.

(*w*) See the form of this plea in Rast. Ent. 230, *a*. Co. Ent. 176, *a*. Herne. 340. Rob. Ent. 297. 1 Bro. Ent. 203. Clift. 303. pl. 12. 2 Wils. 118. In what cases the tenant must plead the special matter, and not *Ne unques seisie*. See p. 145, 154, supra.

(*x*) Co. Ent. 180, *a*.

(*y*) Co. Ent. 180, *a*. 181, *a*. Dy. 313, *b*. 368, *b*. 1 Leon. 53, 54. Rast. Ent. 228, *b*. Robins v. Crutchley, 2 Wils. 122, 125, 127. 2 Jones 38. As to what shall be a good certificate by the bishop, and that he must return the fact and not the evidence, See 2 Roll. 591, 592. Dy. 305, *b*. 306. *b*. 313, 368, 9. Wickham v. Enfield, Cro. Car. 351. Easterby v. Easterby, Barnes, 1. 2d Towns. Judg. 95, 96. 9 Co. 20, *a*. Jenk. p. 44.

(*z*) Booth, Re. Act. 167. Co. Litt. 134, *a*. Co. Ent. 180, *b*.

(*a*) Ilderton v. Ilderton, 2 H. Bl. 145.

(*b*) 2 Wils. 128.

(*c*) Robins v. Crutchley, 2 Wils. 122, 127.

to all the world, for to award a second writ to the bishop would be to try the matter twice.(*d*)

It follows from what has been already observed that the tenant cannot plead bigamy as a bar to the demand, but must avail himself of it on the general issue of *ne unques accouplè*.(*e*) The proper place to produce all evidence tending to invalidate or substantiate the marriage will be in the bishop's court, when the writ from the temporal court arrives there.

The inquisition taken before the bishop is said to be after this manner. "The king first sends his writ to the bishop to make inquiry, for the ecclesiastical judge, before he hath received the king's writ, may not of himself inquire of the lawfulness of the matrimony, but after such time as he hath received the said writ to make the inquiry, he must not surcease for any appeal or inhibition,(*f*) but must proceed until he hath certified the king's court thereof; and then, when the bishop hath received the king's writ, he doth give notice thereof unto the party who took exception to the matrimony at his dwelling-house, if he hath any within the diocese, to speak at a day perfixed by him against the matrimony if he will; and after such notice given, whether the party come or not, the witnesses of the demandant *to prove [*291] the legality of the marriage are taken, and admitted by the bishop, if no sufficient exception be taken to the witnesses. After the depositions taken, they are published, and certified into the king's court where the issue was joined, by letters under the seal of the bishop importing that in pursuance of the said writ he hath made due inquiry, according to the ecclesiastical laws, into the matters therein contained, and that he hath found by lawful proofs and other canonical requisites in that behalf, that such person (as the case shall be) was or was not accoupled in lawful matrimony. For he must certify the point in issue generally, and not make a special verdict of it, or express the manner of the marriage at large. And after such certificate made there shall be no appeal, but the same certificate shall be a bar and conclude all parties for ever. And after such certificate, and re-summons of the tenant in the king's temporal court, judgment shall be given for the plaintiff."(*g*)

The tenant may also plead that the demandant eloped from her husband, and lived with another person in adultery during the coverture.(*h*)

To which the demandant replies, that she did not elope.(*i*)

Or that she was afterwards reconciled to her husband.(*k*)

*The tenant may also plead a divorce *à vinculo matri-* [*292] *monii*.(*l*)

Or he may plead a jointure made by the demandant's husband on her before marriage.(*m*)

(*d*) 2 Wils. 128, 129, and see the point so determined, as to Bastardy, Bro. Estoppel, pl. 68, and as to profession, Fitzh. Abr. Estoppel, pl. 282.

(*e*) Bro. Dow. pl. 54, (cites 39 E. 3. 15.)

(*f*) See Bro. Certificate d'Evesque, pl. 12. Dav. 53, *a. b.*

(*g*) Hughes, 993.

(*h*) Rast. Ent. 230, *a.* 1 Bro. Ent. 204. 2 Bro. Ent. 109. Rob. Ent. 260. Co. Litt. 32. Dy. 107, *a.*

(*i*) Rast. Ent. 230, *a.* 2 Bro. Ent. 109. Rob. Ent. 263.

(*k*) Dy. 107, *a.* 1 Bro. Ent. 204. Co. Litt. 32, *b.*

(*l*) Co. Litt. 32, *a.*

(*m*) Co. Ent. 172, *a, b.* Hob. 71. 104.

Or that it was made after marriage, and the wife agreed to it after the husband's death.(*n*)

To which the demandant may reply that the estate was not made to such uses, or that it was not for a jointure.(*o*)

So the tenant may plead that the husband levied a fine, and the demandant made no claim within five years after his death.(*p*)

To which she may say that she brought her action of Dower within five years.(*q*)

Or the tenant may plead that the demandant's husband made a feoffment of the lands to him, and was afterwards attainted of treason.(*r*)

And a replication that her husband was pardoned will not it seems be any answer, for reasons which have been already adverted to.(*s*)

Or the tenant may plead that the demandant and her husband levied a fine, or suffered a common recovery of the lands.(*t*)

Or that the husband of the demandant is alive.(*u*)

[*293] *To which plea the demandant replies that her husband is dead, and thereon a day is given for proof of his death, which must be made in court by two witnesses at least.(*v*)

And at the same day the tenant may examine his witnesses that the husband is alive.(*w*) And if it appears to the court, by witnesses, that the husband is dead, the demandant shall have judgment immediately.(*x*)

So if the proof of the death is not direct, if there is no proof of his being alive.(*y*)

The tenant may plead that he assigned a rent of so much *per annum* to the demandant in recompense of her Dower. But he must show what estate he had in the land at the time of granting this rent, so as it may appear to the court that he had power to grant it, and if he omit to do this the demandant may demur.(*z*)

The tenant may plead that the demandant is seised of a third part of the land demanded already; but he must show who assigned it, or that she recovered it, for if she were in by disseisin, she must have Dower of other remaining two parts nevertheless.(*a*)

[*294] He may plead that other lands were assigned for Dower *by the heir,(*b*) or by himself who was assignee of the husband.(*c*)

Or that the demandant had released her Dower to the tenant of the freehold.(*d*)

The tenant cannot plead a prior term of years *in bar* to the action, for it is no bar in Dower, but he may plead it in delay of execution, and to save himself the damages, if there was no rent reserved upon the

(*n*) Co. Ent. 171, *b*. 172, *a*. Rob. Ent 261.
(*o*) Co. Ent. 172, *a*, *b*.
(*p*) Co. Ent. 171, *a*. Clift. 305. Dal. 107.
(*q*) Co. Ent. 171, *b*.
(*r*) 2 Hawk. Pl. Cor. c. 49.
(*s*) Supra, p. 221.
(*t*) Rob. Ent. 237.
(*u*) 1 Bro. Ent. 205. Bend. pl. 131. 1 And. 20.
(*v*) Bend. pl. 131. Dy. 185, *a*.
(*w*) Ibid. Moor, 14.
(*x*) Bendl. pl. 131.
(*y*) 1 And. 20. Moor, 14. See p. 247, supra.
(*z*) Beaumont v. Dean, 2 Leon. 10. Moor, 59. Cro. Eliz. 451.
(*a*) 39 E. 3. 17.
(*b*) Moor, 26, 59.
(*c*) Com. Dig. Pleader. (2 Y. 15.)
(*d*) Cro. Jac. 151.

term; or if there was, praying that the demandant may be endowed of the reversion and the rent.(*e*)

And if the tenant does not plead such term, he cannot set it up afterwards, as a prior title, to an ejectment brought by a tenant in Dower, after her recovery, to obtain possession.(*f*)

Of the other sort of pleas which admit the title of Dower, but allege some excuse or reason for not making an assignment, are

1. Detinue of Charters. This plea alleges that the demandant detains the deeds and evidences belonging to the estate, and that the tenant was always ready to assign her Dower if she would deliver them; consequently it cannot be pleaded after imparlance.(*g*)

*But no person but the heir can plead this plea, for it lies only in privity.(*h*) [*295]

And if he pleads this plea, he must show the certainty of the charters, so that a certain issue may be joined, or that they are in a chest or box locked or sealed.(*i*)

And if the heir delivered the charters to the wife, he cannot plead detinue, for she has them by his own act.(*k*)

And as the privity is the foundation of this plea, it shall not be pleaded even by the heir, if he has the land by purchase, and not as heir,(*l*) or if he be not immediately vouched, but only by the vouchee of the tenant,(*m*) or if he comes in as vouchee having no lands in the county where the Dower is demanded,(*n*) or if he comes in as tenant by receipt.(*o*)

In two of these cases there would be an obvious absurdity in the plea, for the plea affirms that the tenant has been always ready, and yet is, to render Dower, if the demandant would deliver to him his *charters, and tenant by receipt, or vouchee over, cannot [*296] render the demandant her Dower, nor can she recover it against him.(*p*)

In these cases, therefore, the widow may recover her Dower although she persists in detaining the charters, but an action of detinue will lie against her for them.

And it is said, that if the wife be with child, the heir for the time being cannot plead detinue of charters, for she may keep them for the infant.(*q*)

It should also be remarked that this plea is not a bar for more lands

(*e*) See Booth v. Lindsay, 2 Raym. 1294. Rob. Ent. 237. Anon. 2 Mod. 18. Villers v. Hanley, 2 Wils. 49.

(*f*) Lindsey v. Lindsey, 1 Salk. 291. 2 Raym. 1294.

(*g*) Rast. Ent. 224, *b*. 229, *b*. Bro. Dow. pl. 53. Moor, 81. Hob. 199. 9 Co. 18. Dal. 100. Perk. sec. 357. Burdon v. Burdon, 1 Salk. 252. 1 Show. 271. Comb. 183. It is now held that an imparlance is not to be granted in Dower. Foster v. Kirby, Barnes, 2.

(*h*) 9 Co. 18. Dy. 230, *a*.

(*i*) 9 Co. 18, 110. Plow, 85. *a*, *b*. Dy. 230, *a*. 11 Hen. 8. *f*. *i*. Perk. sec. 356.

(*k*) 9 Co. 18, *b*. (cites 7 E. 3. Dow. 101. Doct. Plac. 160.)

(*l*) 9 Co. 18, *b*. (cites Ry. 230. pl. 52. 8 E. 3. 55. Doct. Plac. 150.) Dy. 230, *a*. Perk. sec. 356.

(*m*) 9 Co. 18, *b*. (cites 18 E. 3. 36, *b*. Doct. Pl. 150.) Dy. 230, *a*. Perk. sec. 358.

(*n*) 9 Co. 18, *b*. (cites Doct. Pl. 150.

(*o*) 9 Co. 18, *b*. (cites 16 E. 3. Dow. 57, 75. Doct. Pl. 22, 151.) Dy. 230, *a*. Perk. sec. 358.

(*p*) See 9 Co. 18, *b*. 19, *b*. Dy. 230. *a*.

(*q*) Bro. Dow. pl. 8. Perk. sec. 360. As to the issue in this case, see Woman's Lawyer, 262.

than the charters concern.(*r*) But one coparcener may have this plea after partition, though the evidences concern the other parcener and herself equally.(*s*)

If the demandant replies to this plea that she is ready to deliver them to the tenant, and brings them into court, she may pray judgment upon his confession immediately.(*t*)

The demandant may also reply that she does not detain the deeds.(*u*)

[*297] *So, the tenant may plead that he has always been, and still is ready to render Dower; and if he pleaded this plea of *tout temps prist*, at the return of the summons, he may pray that the demandant may not have damages.(*v*)

But the demandant may reply, that she requested her Dower, and the tenant refused to assign it, and issue shall be taken upon that.(*w*)

It is said to be a good plea in bar, that the lands of which a third part is demanded in Dower are of gavelkind tenure, of which Dower is by custom of a moiety.(*x*)

It seems that a feme who claims Dower shall have advantage of an estoppel by deed between her baron and the tenant.(*y*) So also she shall be bound by an estoppel. As where, in a writ of Dower against a guardian, the issue was whether the demandant was feme of the father of the heir, and it was found by verdict that she was not, it was held the heir should estop her by this verdict to claim her Dower, though he was not wholly privy to it, because he should have been bound by it, if this had been found against the guardian.(*z*)

[*298] *In writs of Dower, the parol shall not demur for the nonage of the heir, because of the mischief that might accrue, if the demandant, claiming only an estate for life, should die, and lose the estate.(*a*) But it is said in the ancient law books, that if a feme after the death of her husband suffers one to continue a year and a day, and he dies seised, his heir within age, the feme shall not have Dower during the nonage of such heir, but the parol shall demur, because it was her folly that she did not bring her suit.(*b*)

III. As to the judgment.

The judgment in this action, generally speaking, is to recover seisin of a third part of the tenements in demand in severalty, by metes and bounds, and the mesne profits and damages.(*c*) But if the judgment is obtained against several tenants in common, it is error if it be said 'in

(*r*) Dy. 230, *a*. Perk. sec. 357. (*s*) Bro. Dow. pl. 41. Perk. sec. 359.

(*t*) Rast. Ent. 224, *b*. 230, *a*. Hob. 199. 9 Co. 18, 19, (cites 10 E. 3. 49. *a*. 21 E. 3. 8, *b*.) And it seems that if dower is brought against two, who plead detinue of charters, if the demandant delivers them to one of them, although out of court, she shall be excused against the other. F. N. B. 138, n. (cites 21 E. 3. 8. per Manby.)

(*u*) Rast. 224. *b*. Moor, 81. See p. 227, supra, as to the danger of this plea, if false.

(*v*) Rast. Ent. 236, *b*. 237, *a*.; 1 Bro. Ent. 205; Co. Litt. 32, *b*.; Lut. 717; 2 Mod. 25.

(*w*) See Hargr. Co. Litt. 33, *a*. n. (1.); 13 Ed. 4. f. 7; 1 Lutw. 717.

(*x*) Anon. Sav. 91.

(*y*) Roll. Abr. Estoppel (L.) pl. 1 (cites 3 H. 4. 6. Dubitatur. Co. Litt. 252, *a*.)

(*z*) Roll. Abr. Estoppel. (L.) pl. 11 (cites 30 Ass. 51.)

(*a*) 1 Roll. Abr. 137. Smith v. Smith, Cro. Jac. 111; 3 Leon. 392; 3 Bulstr. 138. Gore v. Perdue, Cro. Eliz. 309; Herbert v. Binion, Cro. Jac. 392.

(*b*) Fleta, l. 6, c. 43; Bract. 252; Britt. c. 111, f. 47; Cro. Jac. 392.

(*c*) See the form, 2d Towns. Judg. 102, pl. 25, 26; 2 Saund. 331, 332.

severalty by metes and bounds,' but it may be 'in three parts to be divided.'(*d*)

If, in Dower, the tenant vouches the heir of the husband in the same county, and the heir demands the lien, and denies it, it is said this issue shall be tried before the demandant shall have judgment in Dower.(*e*)

*It has been already observed that where the tenant vouches the heir, the demandant may witness that the heir has lands by descent in the same county, and she shall have judgment against the heir conditionally.(*f*) [*299]

So if the heir enters into the warranty of the tenant, and pleads *riens per descent*, and the issue is found against him that he has lands in the same county, the demandant shall have judgment against the heir; but if the issue be found for the heir, she shall have judgment against the tenant.(*g*)

And, in this case, she may have judgment against the heir conditionally, without waiting till the issue of assets be tried.(*h*) But it seems that it is not error if she has judgment against the tenant with *cesset executio* until the issue is determined, for if it is found against the heir, the tenant may have *scire facias* against him.(*i*)

And if she recovers against the heir, and is afterwards evicted by title paramount, then she may have *scire facias* against the tenant to have in recompense.(*k*)

If the sheriff, after a recovery in Dower, delivers seisin to the demandant upon the writ of *hab. fac. seisinam*, this is in law on ouster of all termors in possession of the land,(*l*) and therefore, if the title of the *termor is prior to the title of Dower, and this appears to the court, either upon the plea of the tenant,(*m*) or the suggestion of the termor, on prayer to be received for his term, the interest of the termor will be saved in giving judgment.(*n*) This is effected either by giving judgment specially, that the demandant shall recover seisin of *the reversion*, upon which a writ of *hab. fac. seis.* is awarded to the sheriff, with a proviso *quod ten. ad termin. annor. non expellatur;*(*o*) or by giving judgment generally, with a *cesset executio* during the term. The former mode is adopted where there is any rent reserved upon the lease for years, in order to enable the dowress, as the reversioner, to obtain the benefit of the rent;(*p*) and although the rent re- [*300]

(*d*) Glefold v. Carr, Brownl. and Goldsb. 127.

(*e*) Jenk. Cent. 4. ca. 52; Dy. 367; but see 9 Co. 17, *b*.

(*f*) See p. 276, supra; 9 Co. 18. (*g*) Jenk. Cent. 4, ca. 52; Dall. 52.

(*h*) Grey v. Williams, Dy. 202, *b*.

(*i*) Goldingham v. Saunds, Winch. 81; Cro. Jac. 688.

(*k*) 27 H. 8, c. 10; 32 H. 8, c. 5; Wynch. 89.

(*l*) See 3 Leon. 168; but it is said that he who claims the lease for years, may re-enter into the land notwithstanding the recovery and the execution of the dower; and if he be ousted, he shall have his action. Foljambe's case, Godb. 165; and see Michell v. Hyde, 1 Leon. 92: and therefore it was thought in the former case, that the sheriff should serve execution as if there was not any lease for years. See also 1 Com. 188; and 2 Saund. by Williams, 7. *c*. note.

(*m*) See p. 294, supra.

(*n*) See Williams v. Drew, 3 Leon. 168; Green v. Roe, 2 Com. 580; Booth v. Lindsey, 2 Raym. 1294.

(*o*) Wheatley v. Best, Noy, 65; Cro. Eliz. 564.

(*p*) 1 Roll. 678; Noy, 65; Anon. Ow. 32; Winch. 80; Foljambe's case, Godb. 165 Co. Litt. 32, *a*.; 1 Com. 188, in Bodmyn v. Child; but see Jenk. p. 73, pl. 38, contra.

served is but of a peppercorn, it seems that the dowress is entitled to an immediate execution.(*q*) If, however, there is no rent payable in respect of the term, as where lands are limited or devised to one for years, remainder to another in fee, or upon a common demise with no clause of reservation, execution will be stayed during *the continu- [*301] ance of the term, as no benefit could arise to the dowress from her obtaining seisin.(*r*)

Dower being a real action, no damages were at the common law recoverable by the wife for the detention.(*s*) By the statute of Magna Charta,(*t*) indeed, as we have already seen, her Dower was to be assigned to her within forty days after the death of her husband; but, as Coke observes, "of little effect was that act, for that no penalty was thereby provided if it were not done."(*u*) By the statute of Merton,(*v*) however, the grievance was partially remedied by the following provision: "Of widows which after the death of their husbands are deforced of their Dowers, and cannot have their Dower or quarentine without plea, whosoever deforce them of their Dowers, or quarentine of the lands whereof their husbands died seised, and that the same widows after shall recover by plea, they that be convicted of such wrongful deforcement, shall yield damages to the same widows; that is to say, the value of the whole Dower to them belonging from the time of the death of their husbands, unto the day that the said widows, by judgment of our court, have recovered seisin of their Dower, &c.; and the deforcers nevertheless shall be amerced at the King's pleasure." The language of this statute, it will be observed, extends *the recovery of damages [*302] to those cases only where the husband died seised,(*w*) and the seisin intended by the statute is held to be a seisin of the inheritance, so that upon the death of the husband, the possession immediately devolves upon the heir;(*x*) and therefore if the husband aliens, and retakes for life, the wife shall have no damages on this dying seised, for it was only of frank-tenement.(*y*) But it is immaterial that he dies seised of an estate tail.(*z*)

It seems, however, that although the husband does not die seised, the wife may become entitled to damages against the alienee, &c. by a demand and refusal of Dower, but such damages will be recovered only from the time of the demand.(*a*) On this point the books observe, that "she can lay no default in the feoffee till she demand her Dower upon the ground, and that the tenant be not there to assign it, or if he be

(*q*) See Pheasant v. Pheasant, 3 Ch. Rep. 69; Tiffin v. Tiffin, 2 Freem. 66.

(*r*) Perk. sec. 335; Noy, 65; Bodmyn v. Child, 1 Com. 185; and see Brown v. Gibbs, Pr. Ch. 97; 2 Freem. 233; Godb. 165.

(*s*) See 2 Inst. 286; 10 Co. 116. (*t*) Cap. 7.

(*u*) Co. Litt. 32, *b*. 34, *b*. (*v*) 20 Hen. 3, c. 1.

(*w*) Jenk. Cent. 1. ca. 85; Dy. 284. *a*. pl. 33; Bro. Damages, pl. 52.

(*x*) Co. Litt. 32, *b*. (cites 16 E. 3. Damages, 83; 8 E. 2. ibid. 11.)

(*y*) Yelv. 112. Dame Egerton's case, cited Litt. R. 341; Hargr. Co. Litt. 32, *b*. n. (4.); 3 Bulstr. 278; and it has been held, that if the husband is outlawed, the wife shall not recover damages upon the ground that this is a forfeiture of the frank-tenement. Bro. Damages, pl. 98 (cites 13 Ass. 5.) Bro. Utlagary, pl. 36 (cites M. 3 E. 3,) but Brooke makes a query thereof, for the forfeiture was but of the profits, and not of the frank-tenement; and see Bro. Forfeiture de Terres, pl. 30, 75; Bro. Utlagary, pl. 59.

(*z*) Thynn v. Thynn, Styles. 69.

(*a*) Jenk. Cent. 1, ca. 85; Dr. and Stud. Dial. ii. ch. 14.

there, that he will not assign it; for he that hath the possession of land whereunto any woman hath title of Dower, hath good authority, *as against her, to take the profits till she require her Dower."(b) [*303]

And even the heir himself may, as has been already noticed,(c) save himself from damages, if he comes in upon the summons the first day, and acknowledges the action, and pleads *tout temps prist*, i. e. avers that he was at all times ready to render Dower, if it had been demanded. In what cases he may plead this plea has been already stated. If the demandant takes issue upon it, the damages will await the event of the issue.(d)

For this reason it is that Lord Coke observes, "it is necessary for the wife, after the death of her husband, as soon as she can to demand her Dower before good testimony, for otherwise, she may by her own default lose the value after the decease of her husband, and her damages for detaining of Dower.(e)

But even where the heir pleads *tout temps prist* with success, the demandant shall recover damages from the teste of the original to the execution of the writ of inquiry.

In Corsellis v. Corsellis,(f) upon a trial at bar, the issue was, whether there was a demand of Dower and refusal, to entitle the plaintiff to damages. The plaintiff proved an actual demand of the heir, being of the age of fourteen years, and then in her custody; *though by his father's will committed to another person. The infant said his guardian would not let him assign Dower. Resolved unanimously upon debate, 1st, that Dower was demandable of the heir, though he was under age: 2d, that his guardian was but in the nature of a guardian in socage, and that the Dower was not demandable of him, but of the heir, though not in the custody of the guardian; and that if the heir had entered upon the land to assign Dower, he would not be a trespasser upon the guardian, though the custody of the land was committed to such guardian, during the infancy of the heir: 3d, that the neglect of the heir in not assigning Dower upon demand, though he did not actually refuse to do it, was such a refusal in law as to entitle the widow to damages. [*304]

Of course, if the heir controverts the title of Dower, he cannot avail himself of the plea of *tout temps prist;* and therefore, whatever delay may have been made by the widow, she will, if judgment be given in her favour, be entitled to damages from the death of the husband. Lord Coke indeed remarks, that "some say that the demandant in a writ of Dower, that delayeth herself, shall not recover damages;"(g) but this seems to be no further true than as it may enable the heir to save himself of damages, on the plea of *tout temps prist*. In Dobson v. Dobson,(h) in error upon a judgment in Dower, one of the errors assigned was, that damages were given *à morte viri*, whereas they ought only to

(b) Dr. and Stud. Dial. ii. ch. 14. (c) Supra, p. 297.
(d) Co. Litt. 32, *b*. 33, *a*.; Dr. and Stud. 141; Bro. Damages, pl. 52, 79; Bro. Tout temps prist, pl. 34; Bro. Dow. pl. 32; Lut. 717; Bro. Enquest. pl. 79; Gilb. Uses, 375.
(e) Co. Litt. 32, *b*; and see Gilb. Dow. 375, 376.
(f) Bull. N. P. 117; 1 Crui. Dig. 169.
(g) Co. Litt. 32, *b*.; and see Gilb. Dow. 375, 376.
(h) Ca. t. Hardw. 19. 2 Barn. B. R. 180.

[*305] have been given from the time of suing out the writ, *since it did not appear there was any demand of Dower *in pais;* and Co. Litt. 32, 33, was cited, that the demandant should take care to make demand as soon as possible, lest she lose the value of her Dower, and that the heir does no wrong till a demand is made. But it was replied, that it was incumbent on the tenants, would they have excused themselves from damages, to have pleaded *tout temps prist*, as the words of the statute(*i*) expressly require; and upon this answer, the court overruled the exception. And in Kent v. Kent,(*k*) the same exception was overruled in a case where the writ was not brought till two years after the death of the husband.

But where the demandant, after the death of her husband, entered, and continued in possession five years, and afterwards the heir entered, upon which she brought Dower, it was agreed that the tenant need not plead *tout temps prist* after his re-entry, for the time the demandant had occupied was a sufficient recompensé for the damages.(*l*)

The feoffee of the heir cannot plead *tout temps prist*, because he had not the land all the time from the death of the husband, and therefore the demandant shall recover the mesne profits and damages against him; and if he has not provided his indemnity and recompense against the heir, it is his own folly.(*m*)

[*306] *By damages are to be understood the profits of the third part since the death of the husband, or the teste of the original, (after deducting outgoings), and such damages as the wife has sustained by the detention of her Dower,(*n*) which are usually assessed severally, although damages given generally, without finding the value of the land, are good.(*o*) If the lands were leased for years before marriage, she will recover Dower, not according to the value of the land, but according to the rent;(*p*) and it follows, that if the rent reserved was only a nominal one, no damages, or none but nominal ones, can be recovered. The case of Hitchens v. Hitchens(*q*) illustrates this point. The husband's father devised, that in case of deficiency of personal property to pay debts and legacies, his executors should pay the same out of the rents and profits of his real estate; and when debts and legacies were paid, devised his real estate to his son in tail, with remainders over. The executors entered on the real estate, and the son died before the debts were paid, and before he had any possession, and his widow re-

[*307] covered her Dower in the Mayor's Court, and 227*l.* for damages. She *afterwards instituted a suit in the Court of Chancery to have a mortgage term set aside, and for other purposes, and on a cross-bill brought by the devisee of the lands and executors to set

(*i*) Quære, what statute? (*k*) 2 Barn. B. R. 357.

(*l*) Riche's case, 3 Leon. 52; Dal. 100; but see Belfield v. Rous, 4 Leon. 198, and quære.

(*m*) Co. Litt. 33. *a.*; 2 Bac. Abr. 392; and see 1 Keb. 87.

(*n*) Dr. and Stud. 140. Hargr. Co. Litt. 32, *b.* n. (4,) and see Spiller v. Andrews, Lill. Ent. 188. 8 Mod. 25. Walker v. Nevill, 1 Leon. 56. Penrice v. Penrice, 2 Barnes, 191.

(*o*) Hawes' case, Hett. 141.

(*p*) Hargr. Co. Litt. 32, *b.* 32, *a.* n. (5.) In Winch. 80, in a case where the lands were let for years rendering rent, it is said, this doth save to the tenant damages; but it is in all probability a mistake of the reporter. It is obvious that if the widow was dowable of the rent, she is as much entitled to damages for the detainer of that, as if she were dowable of the land.

(*q*) 2 Vern. 404.

aside the recovery of damages, it was admitted by the Lord Keeper that the damages were carried too far back; she having recovered the value from the death of her husband, whereas she ought to have had damages but from the time of debts paid and trusts performed, and the verdict was set aside accordingly.

The statute of Merton, in giving damages, has left the method of ascertaining them to the court; and the usual practice is, unless the damages are either admitted by the party, or ascertained by the jury who try the action, to grant a writ of inquiry;(*r*) and if judgment is given for the demandant by default, confession, or any other way than by verdict, there must of necessity be a jury impannelled to assess the damages.(*s*) In these cases a writ of inquiry of damages issues, commanding the sheriff to inquire whether the husband died seised, and if he did, what value the lands are by the year, and how long it is since the husband died; and upon return of the inquisition, judgment is entered for the damages.(*t*) And upon damages being adjudged, they shall be recovered against the tenant to the writ *in toto*, notwithstanding there may have been several in receipt of the profits successively since the death of the husband, and [*308] not against every one for his time, as in cases of Disseisin,(*u*) for the statute of Gloucester does not extend to this case.

By the words of the statute, the damages are given from the death of the husband to the day that the widow shall have recovered seisin by judgment. But where a writ of inquiry is awarded, it seems to be now established, contrary to the opinion of the court in Penrice v. Penrice, 2 Barnes, 191, that the value shall be computed to the time of assessing the damages on the inquisition,(*v*) unless the demandant has been in possession any part of the time under the *habere facias seisinam*, and then only to the time of seisin delivered.(*w*) The judgments for seisin and damages being distinct, the tenant may, if the latter be erroneous, release the damages,(*x*) and the judgment *quoad* the land may be affirmed in a writ of error, and the judgment for damages reversed;(*y*) and until the damages are ascertained by the inquisition, the judgment does not bind the land, so as to charge the heir if the tenant dies before [*309] the damages are assessed,(*z*) for they are given in respect of the tort in detaining Dower, and *actio personalis quæ oritur ex delicto moritur cum persona*. So also, if the demandant die before the damages are ascertained, the executor shall not have them, for the damages are no duty till they are ascertained; and it makes no difference that the tenant had entered into a recognizance (under 16 and 17

(*r*) Kent v. Kent, 2 Barn. 442. Hargr. Co. Litt. 32, *b*. n. (4,) and see 2d Towns. Judg. 100, 101, pl. 22, 23. Ib. 102, pl. 24.

(*s*) 1 Keb. 85, marg. (cites 3 E. 3. 23, *b*. pl. 13. Dower F. 73. 3 Cro. 557. 14 H. 7, 25, pl. 5,) and see Rast. Ent. 238, *a*. *b*.

(*t*) Rast. Entr. 238, *a*, *b*. Dennis v. Dennis, 2 Saund. 331.

(*u*) See 1 Keb. 86, marg. Bellfield v. Rowse, Mo. 80. N. Bendl. 153. Co. Litt. 33, *a*. (cites 1 Ro. Abr. 679.) Brown v. Smith, Bull. N. P. 117.

(*v*) Dobson v. Dobson, Ca. t. Hardw. 19. 2 Barn. B. R. 180, 207, and see the Record in Spiller v. Andrews, Lil. Ent. 189, incorrectly reported in 8 Mod. 25. Thynne v. Thynne, T. 1649, (cited Hargr. Co. Litt. 32, *b*, n. (4.)

(*w*) Walker v. Nevil, 1 Leon. 56. (*x*) Butler v. Ayre, 1 Leon. 92.

(*y*) Hargr. Co. Litt. 32, *b*. n. (4,) cites 22 E. 4, 46, and see 2 Raym. 1385, arg.

(*z*) Aleway v. Roberts, 1 Keb. 85, 171, 646, 711. 1 Sid. 188. 1 Lev. 38.

Car. II. cap. 8,) to pay the damages and costs if the judgment were affirmed, on bringing a writ of error.(*a*)

No authority was given by the statute of Merton to superior courts, where it came by writ of error from those below, to give judgment for the value till the time of affirmance in their courts; but as this was a plain defect, the statute 16 and 17 Car. II. c. 8, sec. 3 and 4, was made in order to give them such power.(*b*)

No damages can be recovered on a writ of right of Dower,(*c*) because damages can only be given for the detention of the possession; and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done until the right is determined.(*d*) So also where Dower was assigned in Chancery, on the writ *De Dote assignandâ*, there *could be no damages: "for (says Coke) the words of the statute be, *Et viduæ per placitum recuperaverint*," &c.(*e*) So if the heir or his feoffee assigns Dower, and the widow accepts thereof, she cannot afterwards claim any damages; because having accepted the Dower, which is the principal, she cannot after sue for damages, which are only accessory.(*f*)

[*310]

If damages are obtained upon a verdict in Dower, the statute of Gloucester (6 Ed. I. c. 1, sec. 2,) gives the demandant costs; but if no damages are given, the demandant, although she obtains judgment for her Dower, must pay her own costs.

By the statute 16 and 17 Car. II. cap. 8, sec. 3 and 4,(*g*) it was enacted, "that in writs of error to be brought upon any judgment in any writ of Dower, or in any action of *ejectione firmæ*, no execution shall be thereupon or thereby stayed, unless the plaintiff or plaintiffs in such writ of error(*h*) shall be bound unto the plaintiff in such writ of Dower, or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition that if the judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued in default of the plaintiff or plaintiffs therein, or that *the said plaintiff or plaintiffs be nonsuited in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages,(*i*) and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit had. And to the end that the same sum and sums and damages may be ascertained, it is further enacted, that the court wherein such execution ought to be granted, upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits,(*k*) as of the damages by any waste committed after the first judgment in Dower, or in *ejectione firmæ;* and upon the return thereof,

[*311]

(*a*) Mordant v. Thorold, Carth. 133. 1 Salk. 252. 1 Show. 97. 3 Mod. 281. 3 Lev. 275. Rep. t. Holt, 305, and see 2 Bro. C. C. 629, 632, in Curtis v. Curtis.

(*b*) Ca. t. Hardw. 50. (*c*) Co. Litt. 32, *b*. 1 Keb. 86. arg.

(*d*) 1 Crui. Dig. 169.

(*e*) Co. Litt. 33, *a*. (cites 43 Ass. pl. 32. F. N. B. 263,) and see Bro. Damages, pl. 195, (cites 42 Ass. 32, and 43 E. 3, 32.)

(*f*) Co. Litt. 33, *a*. 1 Crui. Dig. 170. Fitzh. N. B. 148, n. Gilb. Dow. 375.

(*g*) Irish, 17 and 18 Car. 2, c. 12. (*h*) See Barnes v. Bulwer, Carth. 121.

(*i*) See Glefold v. Carr, Br. and Goldsb. 127, that a writ of error cannot be brought by the tenant to a writ of dower before the damages found.

(*k*) See Kent v. Kent, 2 Stra. 971.

judgment shall be give and execution awarded for such mesne profits and damages, and also for costs of suit."

No statute of limitations has prescribed any period for the bringing of a writ of Dower. The remedy, however, may be barred by the statute of non-claims, if the husband levies a fine with proclamations, and the wife does not bring her writ of Dower within five years after her title accrues by the death of her husband, or after the disabilities (if any,) existing at that time, are removed.(*l*) So, "if the husband aliens in fee, and his alienee levies a fine with proclamations, non-claim on this fine will be a bar to the writ of Dower.(*m*) The same effect may arise from a fine levied by the heir or devisee of the husband.(*n*) And it has been held that a mere delivery of the writ of Dower to the sheriff, without *procuring the same to be returned, is not a sufficient claim to avoid the fine.(*o*)

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But if the husband levies a fine with proclamations, and afterwards is attainted of treason, and dies, and the heir reverses the attainder by writ of error, the wife shall have her Dower, notwithstanding five years had passed after the death of the husband before the attainder; for during the attainder she could not claim, and the action and right of Dower accrued to her after reversal of the attainder.(*p*)

It is a general proposition in most of our text books, as well as in the decided cases, that no fine will operate as a bar by non-claim, unless the estates or interests of the persons to be barred are devested at the time of levying the fine, either by some previous act, or by the operation of the fine itself. Hence the necessity that the person by whom the fine is levied should be seised of the immediate freehold, unless the estates of those against whom the benefit of the non-claim is to be obtained, have been previously turned to a right; for a fine levied by a remainder-

(*l*) Damport v. Wright, Dy. 224, *a*. Anne Summer's case, Winch. 66. 2 Co. 93. 10 Co. 49, 99. Moor, 53. Shep. T. 28, 32. Menville's case, 13 Co. 20. Goldsb. 148, pl. 71. Anon. 3 Leon. 50. Crave v. Broughton, Dal. 107. S. C. Ib. 52. 2 Roll. R. 69. S. P. arg. (cites 15 Eliz. Paine's case.) This point was formerly doubted: see 3 Leon. 50, and Stowel's case, Plow. 373, *a*. where the learned commentator says—"Note, reader, that in my opinion, if the husband levies a fine with proclamations, and five years pass after the proclamations, the wife shall not be bound to five years after the death of the husband, but is at large, and not touched by the purview of the act of 4 H. 7, [c. 24.] For the purview was against those who had right at the time of the fine levied, or had future right after, upon a cause arising before; to which future right wrong was done before the fine, or by the fine, &c.: but here, in case of dower, the title is accrued all after the fine; *sc.* by the death of the husband, for till the death no title was consummate; and the other two points, *sc.* intermarriage and seisin of the husband, are not of any moment without the third, so that all the three points are but one cause after the fine."—"But," says Coke, in reply to the reasoning of Plowden, "although to the consummation of dower, three things are requisite, that is to say, marriage, seisin, and the death of the husband; and although at the time of the fine levied, her title was not consummate, that the law respects the first and original causes, *sc.* marriage and seisin." 2 Co. 93. And in another place, he says.—"And the opinion of Plowden aforesaid is not held for law, as appears in 6 E. 6. Dy. 72, and in Damport's case, in 5 El. 224. Dy. it appears it was adjudged to the contrary in 4 H. 8, and now common experience, without contradiction, is against it." 10 Co. 49.

(*m*) Shep. T. 28, (cites Anne Twist's case, M. 18. Jac. C. B.)

(*n*) 1 Prest. Conv. 229.

(*o*) Fitzhugh's case, 3 Leon. 221. See also Anon. Ib 50, and said, per Dyer J. that the bringing a writ of dower was the only way the wife could make her claim, for she could not enter to avoid the fine.

(*p*) Menville's case, 13 Co. 19. Moor. 639, S. C. cited by Coke, C. J. as resolved, for she had no means of reversal. S. C. Sav. 54. 3 Inst. 215. *b*. 2 Bulstr. 245.

man or reversioner can operate as a conveyance only, and not as a de-
[*314] vestment or discontinuance. But the very terms of the rule exclude, rather than embrace, *the case of persons having executory titles, or future rights only, at the time of levying the fine; and as it would appear that there can be neither a necessity or a capacity to devest that which is not vested, it may be safely assumed, that a title of Dower may be barred by non-claim on a fine, although levied by a person who had no seisin of the immediate freehold. The case, indeed, seems to be rather an illustration of, than an exception to the general rule above stated. If this view of the subject be correct, it is clear that Ann Twist's case,(*q*) which has been considered hostile to the modern decisions on non-claim, does not in the least interfere with the principle of those decisions. In that case, as reported in Shepherd's Touchstone, it was held, that, "if one seised of land in fee marry a wife, and after make a lease of this land to A. for life, the remainder to B. in fee, and B. levies a fine with proclamations, and the husband dies, and the wife doth not make her claim, &c. within five years after the death of her husband, hereby she is barred of her Dower for ever, notwithstanding the estate for life in A.(*r*)

[*315] It appears from a note in Bosanquet and Puller's *Reports, (Vol. II. New Series, p. 37,) that Ann Twist's case was under the consideration of the judges, in the case of Rowe v. Power there reported, and that the roll having been searched by direction of the judges, no judgment appeared to have been entered. The reporters add that the learned author of the Touchstone was therefore probably mistaken in supposing any judgment to have been given in that case, and Mr. Sugden, in his valuable notes to Gilbert on Uses,(*s*) has stated that Ann Twist's case was expressly over-ruled both in the case of Rowe and Power, and in that of Carhampton v. Carhampton.(*t*) The authority of Twist's case, as a legal decision, must certainly fail in the absence of the judgment: it may be submitted, however, with the greatest deference, that for the reasons above mentioned, the principle of the case, as stated by Shepherd, is by no means inconsistent with the cases mentioned by Mr. Sugden.

It seems that a warranty is no bar in a writ of Dower.(*u*) Lord Coke remarks, that "there are some titles to which a warranty doth not extend, as the title in case of discharge, condition upon mortgage, &c. mortmain, consent to ravisher, or the like; because for these no action

[*316] lies in which there *can be voucher or rebutter, neither can a descent toll the entry in such cases; and they continue in such plight and possession as they were by their original creation; and they by no act can be displaced or divested out of their original essence.

(*q*) Shep. T. 27.

(*r*) The case is shortly stated in Hob. 265, under the name of Twisse v. Cotton, thus—"Tenant for life, the reversion in fee, of land whereof the demandant had title of dower, and brought a writ of dower against the tenant for life. Hanging the writ, [he] in the reversion levied a fine with proclamations of the reversion; the tenant for life died, the five years expired, and now the demandant brings a new writ of dower against the tenant in possession."

(*s*) P. 122, note. (*t*) Irish T. R. 567.

(*u*) Arg. Roll. R. 307, in Holland and Lee, (cites 34 E. 3. Garranty, 72. 21 E. 4, 8,) and ib. S. P. admitted by counsel, but said, this seems intended where the title of dower accrues after the warranty descended.

Vide 34 E. III. Garranty 72. A collateral warranty shall not bar a title of Dower, for that continues the essence according to the original creation, and yet for that an action is given."(*v*)

*CHAPTER XV. [*317]

Of the REMEDIES *for the* RECOVERY OF DOWER *in courts of* EQUITY.

It appears that so early as the reign of Elizabeth, courts of equity had assumed some kind of remedial jurisdiction on claims of Dower. In a case of Wild v. Wells,(*a*) (1583) a bill to have Dower set out, and for arrears, was entertained in Chancery; and it seems to have been considered that that court might set out the Dower by commission, and an order *nisi* was made accordingly. From the very short notes of this case in the books, it is impossible to gather what the equity was founded on; unless, perhaps, upon the ground that the claim of arrears involved a species of account, and that the court having thus obtained a jurisdiction of the subject, would proceed to decree complete relief, upon an admission probably of the legal title.

Unless this case may be considered to the contrary, the jurisdiction as to Dower in courts of equity does not appear, until within a very recent period, to have assumed any higher character than that of auxiliary; but at the present day these courts seem to be considered as possessing, to a great extent, a concurrent jurisdiction as to Dower with *courts of law. It may perhaps admit of doubt whether the [*318] doctrine has not been carried higher than the reason of the case justifies.

The earlier cases in which courts of equity have entertained bills relative to Dower, have proceeded upon the common equitable ground of paving the way to the establishment of a legal right, by furnishing a discovery of matters essential to the prosecution of that right; or putting out of the way impediments which might be set up, against conscience, to obstruct the success of the claimant; and this relief was gradually extended, probably upon the principle that when a court of equity has once obtained jurisdiction over the subject matter by reason of an equitable question, it will proceed to do complete justice between the parties, and to give the whole relief to which they are entitled: subject, as to any question which may arise of purely legal cognizance, to the result of a decision by the proper tribunal.

Thus in Dolin v. Coltman (1684),(*b*) a wife joined with her husband in a mortgage, and levied a fine to the intent to bar her Dower; and in consideration thereof, the husband agreed that the wife should have the equity of redemption; but he afterwards mortgaged the estate himself twice more. This settlement of the equity of redemption was adjudged fraudulent, as against the subsequent mortgagees, but in regard the wife in confidence thereof had levied the fine, it was decreed that she should be restored to her title of Dower [as against the puisne mortgagees:]

(*v*) 10 Co. 98, *b*. Co. Litt. 389, *a*.
(*a*) 1 Dick. 3. Toth. 145, and see Thomas v. Thomas, Toth. 163.
(*b*) 1 Vern. 294.

[*319] "and whereas the mortgagees pressed that *the decree might only be, that she should enjoy her Dower, notwithstanding the fine; the court thought it unreasonable in this case to put the wife to her writ of Dower; because they might convey away the estate, and she not know against whom to bring her writ of Dower; and therefore decreed the Dower to her."(*c*)

This decree seems to have proceeded on the admission by the mortgagees of her right to Dower, and the probability of difficulty in the prosecution of her right at law. But little reliance can be placed on the vague and unsatisfactory report in Vernon, and the case is inconsistent with itself, as it immediately before states that the husband and wife were both living.

In Shute v. Shute(*d*) and Wallis v. Everard(*e*) (1708), the court refused to entertain bills for Dower, because there was no impediment at law.

In Moor v. Black(*f*) (1735), the plaintiff charged in her bill, that her husband's ancestor died seised of several estates, which upon his death descended, *as to one moiety*, upon her husband in fee, who died *before any partition* made, and that the defendants had *got possession of all the title-deeds*, whereby she was disabled from suing for her Dower at law, and therefore came into that court to have her Dower assigned.

The defendants demurred, for that the plaintiff's right of Dower was a right merely at law, and triable by a jury; and that no impediment was suggested why she could not recover at law.

[*320] *On arguing the demurrer it was insisted for the plaintiff, that she was proper to come into that court, both by reasons of the deeds being in the defendant's hands, without which she could not prove her title at law; and also for that the estate being in coparcenary, and no partition made, the sheriff could, upon recovery in a writ of Dower, put her into possession but of a third of an undivided moiety; and that still recourse must be had to that court for a certainty, and to set out a part to her; the judgment in Dower not reducing it to more certainty than it was before, and that by bringing this bill the plaintiff had only done at first what she must have done at last.

It was insisted on the other hand for the defendant, that though the plaintiff might be entitled to a discovery, yet she could not be so to have Dower assigned her; that being a title merely at law, and for a detainer of which damages were to be assessed by a jury; and that she was not entitled to the possession of the deeds, but that they belonged to the defendant.

Lord Chancellor Talbot over-ruled the demurrer upon both points, saying, that there was no possibility for the plaintiff (as appeared to him) to recover without the assistance of the deeds; for the estate descending upon her husband in July, and he dying upon the 11th of March after, before any receipt of rent or partition made, she could not prove a seisin at law to entitle herself to Dower.(*g*)

(*c*) 1 Vern. 295.
(*d*) Pr. Ch. 111.
(*e*) 3 Ch. Rep. 161.
(*f*) Ca. t. Talb. 126.
(*g*) This observation is inaccurate. An actual seisin is not necessary to a title of Dower. See p. 31 supra. It would be sufficient to prove the seisin of the ancestor, his death, and the heirship.

*Secondly, That she lay under another difficulty, as her husband's estate was complicated, and that she must come [*321] there for a partition; otherwise the consequence would be that after judgment and execution she must, at the end of every six months, be driven to her action against such as held jointly with her, and who received the profits, for her share, and also for her damages for the detainer; which would be absurd and unreasonable.

In the case of Dormer v. Fortescue (1744), upon a question of equitable relief as to rents and profits, Lord Hardwicke incidentally remarked, "So in the case of Dower, if a widow is entitled to Dower, and her claim is merely upon her legal title, but she cannot ascertain the lands out of which she is dowable, this court will assist her to find out the lands, and the court will order her to proceed upon a particular part, and reserve the further consideration till after judgment, and if her title of Dower is established, will give her profits," &c. He added, "I will put this case; suppose a widow entitled to Dower of an estate, upon which a term for years was standing out, and she had her title of Dower out of the reversion of the term, and she comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time of her title accrued, and will set the term as a satisfied one out of the way; but if that term had been out of the way, *and she had no need to come into this court, it would have been otherwise.*"(*h*)

*In the subsequent case of Curtis v. Curtis(*i*) (1778), a [*322] bill was filed setting forth a title of Dower in the plaintiff, and that notwithstanding, the defendant as heir at law and devisee of her husband had taken possession of the estates, and praying an account of one-third of the rents since the decease of the husband, and to be let into possession of one-third of the lands, and decreed to hold the same for life. The defendant insisted, by answer, that the plaintiff was never married to the deceased, and therefore that she was not dowable; and Lord Chancellor Bathurst ordered the bill to be retained for twelve months, with liberty to the plaintiff to bring her action at law to try her right to Dower, and in case she should do so, the consideration of costs and further directions were reserved till the master should have made his report; but in case she should not proceed to trial, the bill, as far as it prayed relief as to Dower, was to stand dismissed. The plaintiff having obtained a verdict at law, and an order at the Rolls (upon a bill of revivor and supplement), that the former decree should be carried into execution, and the defendants having petitioned for a re-hearing, the cause was re-heard before Lord Alvanley upon a question as to the account of rents and profits; and it was urged in argument by the counsel for the plaintiff, that the bill of revivor and supplement could not be dismissed without re-hearing the first decree, and they insisted that "it never was suggested at the former hearing, that this bill for Dower was improper; because it was perfectly understood "to have been [*323] the settled practice of the court to grant commissions to assign Dower where no legal impediment has been proved; nor would it have been tried, but for the doubt upon the marriage." Lord Alvanley, in giving judgment, took occasion to observe that it was now a settled

(*h*) 3 Atk. 130, 131. (*i*) 2 Bro. C. C. 620.

point that Dower is a mere legal demand, and that the widow's remedy is *primâ facie* at law. But then the question comes, whether the widow cannot come either for a discovery of those facts which may enable her to proceed at law; and on an allegation of impediment thrown in her way in her proceedings at law,(*k*) this court has not a right to assume a jurisdiction to the extent of giving her relief for her Dower, and if the alleged facts are not positively denied, to give her the full assistance of this court, she being in conscience as well as law entitled to her Dower.

[*324] *Cases have been mentioned, to show that there must be some fraud to give this court a jurisdiction, and that in the simple case of a woman claiming her Dower, no such jurisdiction exists. Dormer v. Fortescue, is also brought to show that there must be either an infant concerned, or some particular circumstances in the case to entitle this court to proceed. Now it seems difficult to distinguish the two cases of the infant and the widow. The principle in the case of the infant is, that he is thought not conusant of his rights at law, sufficiently to enable him to proceed there, and therefore the court of equity will give him all the relief he could have had at law, and something more; for on a bill by an infant for an account, he will get the mesne profits, which would certainly be gone at law by the death of the party. I argue in the same manner for the widow. She comes here and says the law gives me Dower out of the estates of my husband, and the mesne profits from his death: I do not know how to proceed; for if there should turn out to be any mortgage or terms of years in my way, then I must pay the costs. The defendant has all the title deeds in his hands, and knows what the estates are; his conscience is affected, and yet instead of putting me in possession of my rights, he turns me out of doors, and keeps all the title deeds. Now I think this argument is a strong one, on the subject of fraud and concealment on the part of the heir, in not informing the widow of all that is necessary to enable her to proceed safely at law. If then she comes here for a discovery of these matters which the heir withholds from her, she shall have her complete relief in this court.

[*325] *If you deny her right to Dower, the question must be tried at law; but when the fact is ascertained, she shall have her relief here.

The reasoning of Lord Alvanley in this case certainly puts the doctrine rather high; and would go to prove that in every case in which difficulty exists in proceeding at law, the court shall not only exercise its ancillary jurisdiction by removing the impediment, or furnishing the discovery, but shall proceed to give the relief itself which is the legitimate result

(*k*) It does not appear from the report of Curtis and Curtis that there were any such allegations in the plaintiff's bill; on the contrary, the defendant's counsel are represented as stating that her bill did not suggest any impediment to her proceeding at law, and observing, that the demand being at law, the bill should have stated some ground (as a fraud or other impediment to her trying her title at law) for coming into a court of equity. It was, however, stated at the bar by Mr. Lloyd, on the hearing of Mundy v. Mundy, that it appeared from the register's book that the bill charged that the defendant well knew that the plaintiff had not any of the title deeds or writings showing what interest her husband had in the estate, but that all such deeds and writings were in the defendant's own hands; that he pretended that her husband was only tenant for life; and that there were mortgages and terms for years outstanding, which he would set up against her claim if she should proceed at law. Mr. Lloyd added, that the Master of the Rolls relied upon these charges, and stated that the bill would not have been proper without such allegation. 2 Ves. J. 124.

of the proceeding at law. The point was put upon a somewhat different, and probably a more judicious ground by Lord Loughborough in the subsequent case of Mundy v. Mundy.(*l*) He observed, in answer to what had been said at the bar, that "it is a new proposition that where there is a title at law this court cannot in any shape or for any purpose interfere. If a legal title, such as Dower, is controverted, it must be made out at law. In those cases, all that the court has said is, that Dower is a legal title which must be made good at law. But this court will act in aid of the title. If it is not controverted, it is very similar to the right of a tenant in common. This court has entertained bills for partition; and the jurisdiction has been admitted in bills for Dower, under some circumstances, for a long time. The principle of that is just; for where parties have a common interest, they have a right to have it ascertained. That necessarily involves a species of account. If that is answered by the proceeding here there is no occasion to send it to law, where there *is a degree of intricacy and difficulty. This has had the effect of almost putting an end to writs of [*326] Dower. In the course of twelve years I do not remember more than two; and they must be in the Court of Common Pleas. But this jurisdiction is peculiarly proper on other considerations; for if she was to proceed at law, she could be opposed only by a legal bar.—Now equitable bars are in daily practice."

The particular point determined by the case of Mundy v. Mundy was, that if the title of the plaintiff to Dower is admitted by the answer, the bill shall be entertained and relief given, although *no impediments to proceeding at law are alleged*, and therefore a demurrer to so much of the bill as sought to have Dower assigned, accompanied by an answer to the discovery, admitting the title of the plaintiff, was over-ruled. This case appears to have proceeded upon the ground that the defendant having by his answer admitted the title of Dower, had made a trial at law unnecessary; and that it was absurd to send it to law to have that tried which was not disputed. The exact case, however, can hardly occur at this day, as it is now held that a demurrer to the relief covers the discovery, and that such demurrer must, contrary to the former practice, be general;(*m*) and were a woman now to file a bill for Dower, not stating any impediments at law, it may be doubted, notwithstanding the decision in Mundy v. Mundy, whether a general demurrer to such bill would not be sustained, although, *after the strong disposition manifested in that case, it would, perhaps, scarcely be [*327] considered prudent to demur even to such a bill. In point of practice, the writer believes that bills for Dower uniformly allege impediments to recovery at law, either real or supposititious, in order to attract the jurisdiction; and, as the observation of Lord Alvanley in Curtis v. Curtis, that *if the alleged facts are not positively denied, full relief will be given in equity*, necessarily implies, that the truth of such allegation is essential to the plaintiff's right to relief, it would seem that, if that observation can be relied upon as the law of the court, a bill for Dower alleging impediments which do not exist in fact, ought to prevent the abuse of the jurisdiction which might otherwise arise, be pleadable to,

(*l*) 2 Ves. J. 129. 4 Bro. C. C. 294. (*m*) 10 Ves. 553. 6 Ib. 686.

although a plea to such a bill must necessarily be in some degree a negative plea.

It has been held, that the defendant in a bill for Dower cannot plead to the discovery and relief, that he is a purchaser for valuable consideration without notice. This was decided by Lord Thurlow in Williams v. Lambe(*n*) (1791). This case has frequently been considered as improperly breaking in upon the rule of courts of equity, that a purchaser answering the above description, shall not be compelled to furnish the means of attacking his own title. Lord Thurlow is reported to have observed, in over-ruling the plea, that "the only question was, whether a plea of purchase without notice would lie against a bill to set out Dower: that he thought *where the party is pursuing a legal title, as Dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim."

[*328]

Upon this point Mr. Sugden remarks, that "to argue from principle, it seems clear that the plea is a protection against a legal, as well as an equitable claim; and, as the authorities in favour of that doctrine certainly preponderate, we may perhaps venture to assert, that it will protect against both."(*o*)

The case of Williams v. Lambe, however, may perhaps be supported on its particular circumstances, on the ground that the plea was bad as covering too much, being to the relief as well as the discovery. The dowress had a right to recover against the purchaser at law, and if it be established that a court of equity has a concurrent jurisdiction to assign Dower, such a plea to the *relief* would appear to be inapplicable, although it might be good to the discovery, since the relief prayed is not the assistance of the court, to enable the dowress to make good her title at law, but merely to give her the effect of a recovery at law. It is indeed observable, that the observations of Lord Thurlow in the above case, seem distinctly addressed to the plea, as a plea to the *relief;* and his omitting to intimate that such a plea might be good as to the discovery, might possibly be accounted for by the consideration, that in a case *so circumstanced, a plea to the discovery would almost unavoidably be over-ruled by the answer.

[*329]

Notwithstanding the readiness which the Court of Chancery now manifests to give relief to widows claiming Dower, it seems universally admitted, that the question of *right*, if controverted, must be sent to law to be tried by a jury;(*p*) no case having ever gone the length of holding, that when the parties are before the court upon a bill for Dower, and the title of the plaintiff to be endowed is denied by the answer, the court has any incidental jurisdiction to inquire into that question itself.

But although a court of equity will not do this, it will give every assistance to the widow in its power, by paving the way for her to establish her right at law, and by giving complete relief when the right is ascertained.(*q*) And, therefore, if she cannot ascertain the lands out of

(*n*) 3 Bro. C. C. 264.

(*o*) Sugd. Vend. 668. The author of the Treatise of Equity (l. iii. ch. ii. § 3,) observes, that "precedents of this kind are very ancient and numerous, where the court has refused to give any assistance against the purchaser, either to the heir or the widow, the fatherless, or to the creditors."

(*p*) Curtis v. Curtis, 2 Bro. C. C. 631, 633. Mundy v. Mundy, 2 Ves. J. 128; and per Lord Redesdale, in D'Arcy v. Blake, 2 Sch. and Lefr. 391.

(*q*) Curtis v. Curtis, 2 Bro. C. C. 634. Mundy v. Mundy, 2 Ves. J. 129.

which she is dowable, the court will assist her to find out the lands, and will order her to proceed upon a particular part, and reserve the further consideration till after judgment;(*r*) so also, they will aid her with a discovery of the title-deeds;(*s*) and the court will, it seems, enforce such discovery against a purchaser for valuable consideration without notice.(*t*) *And a bill lies for the discovery of a tenant to the præcipe, whereby to ground an action of Dower.(*u*) [*330]

We have seen, that at law, the widow loses her damages if the tenant dies after judgment, and before they are assessed, and also, that if she herself dies before the damages are ascertained, her personal representative cannot claim them. But, in equity, a different rule prevails; and the court will decree an account of rents and profits against the respective representatives of the several persons who may have been in possession since the death of the husband, provided that at the time of the bill filed, the legal right to damages was not gone.(*v*) This, if I understand it rightly, is the result of what is said by Lord Alvanley, in Curtis v. Curtis. The expressions of that judge, however, as stated in the report, are open to some observation, and may be rather calculated to mislead than to produce a sound conclusion. He is said to have observed, that "taking it for granted that the widow *coming after the death of the heir*, would not be entitled to her mesne profits, it by no means follows, that when the widow is right in this court, but the heir happens to die before she has fully established her right, she is not entitled to her mesne profits: for unquestionably, if the heir, instead of contesting the widow's right, had admitted it, she would have been entitled to her decree *for mesne profits, and his having thrown an impediment in her way, shall not make the difference." It might [*331] be inferred from this, that if the widow neglected to file her bill in the lifetime of the heir, she would not be entitled to a decree for mesne profits. The reasoning, however, on which it is founded, by no means bears out the proposition to this extent, for we have already seen that the widow's right to recover damages at law is not necessarily lost by the death or alienation of the heir, since, if she had not recovered judgment against the heir during his life, she may bring her writ of Dower against his heir or alienee; and on judgment obtained on that writ, she will be entitled to damages for the whole time from her husband's death. The only case in which damages are lost at law by the death of the heir, is when he dies after judgment, and before the damages are ascertained, and then his heir or alienee shall not be charged in damages, because they are not a lien on the land till ascertained, and the widow cannot obtain a fresh judgment against them, because she has already recovered the thing demanded by the writ. Now, as an action at law for Dower scarcely ever has been commenced, when a bill is filed in Chancery, but the parties are only sent to law by the court, to try an issue upon some question affecting the title of Dower, it is difficult, if not impossible, to

(*r*) Per Lord Hardwicke, in Dormer v. Fortescue, 3 Atk. 130; and Lord Redesdale, in D'Arcy v. Blake, 2 Sch. and Lefr. 391.

(*s*) See 2 Bro. C. C. 631, in Curtis v. Curtis; and 2 Sch. and Lefr. 391, in D'Arcy v. Blake.

(*t*) Williams v. Lambe, 3 Bro. C. C. 264. But see supra.

(*u*) Kempe v. Risbie, Toth. 84.

(*v*) Curtis v. Curtis, 2 Bro. C. C. 632; Dormer v. Fortescue, 3 Atk. 130.

find a reason why the bill should be filed in the lifetime of the heir, to entitle the widow to a decree for mesne profits.

It has also been decided, that though the widow should die before she [*332] had established her right to *Dower, equity will, in favour of her personal representatives, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable.(*w*)

In a case of Lindsay v. Gibbons,(*x*) not reported, Lord Loughborough is said to have stated, that there were no cases that warranted giving interest on [arrears of] Dower.

It seems that courts of equity, following the analogy to damages, under the statute of Merton, will not entertain a bill for mesne profits, where the husband did not die seised: neither will they where the plaintiff is in possession, and consequently may have remedy at law.(*y*) But when the plaintiff is in a situation to be entitled to mense profits, it appears that no limitation can be set up in equity to the recovery of arrears, for there being no limitation at law in assessing damages, the usual limitation of account to six years, by analogy to the statute of limitations, does not apply.(*z*)

Where a widow comes into the Court of Chancery, for the single purpose of having her Dower set out, costs do not follow the suit, as of course. But separate questions of title often arise, which may be conducted vexatiously, and so as to be the subject of costs.(*a*)

[*333] *And, where the bill is for other purposes than the single object of obtaining an assignment, as for an account, and the dowress has made every attempt to settle, and has been vexatiously kept out of her Dower, without any just pretence, she will have costs.(*b*)

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*CHAPTER XVI.

Of the situation of a DOWRESS *before and after* ASSIGNMENT, *and of the nature and qualities of* HER ESTATE.

THE situation of a dowress after the death of her husband, and before assignment, is very peculiar. Although the *title of Dower* is consummate, the *title of entry* does not accrue until the ministerial act of assigning to her a third part in certainty has been performed by some other person. In the mean time her situation is an anomalous case in the law of England, standing upon its own peculiar circumstances, and neither borrowing nor affording any analogies. It is probably the only existing case in which a title, though complete, and unopposed by any adverse right of possession, does not confer on the person in whom it is vested, the right of reducing it into possession by entry. The situation

(*w*) Wakefield v. Child, 8 July 1791, MS. (cited 1 Fonbl. on Eq. 23.)
(*x*) Cited 3 Bro. C. C. 495. (*y*) Delver v. Hunter, Bunb. 57.
(*z*) Oliver v. Richardson, 9 Ves. 222.
(*a*) Lucas v. Calcraft, 1 Bro. C. C. 134; 1 Ves. and Bea. 20. n. See Curtis v. Curtis, 2 Bro. C. C. 632. "I admit she has no costs, where the heir has thrown no difficulties in her way; and if the heir admits the widow's case, he is safe."
(*b*) Worgan v. Ryder, 1 Ves. and Bea. 20.

of a dowress has no resemblance to that of a person who has become entitled to a particular estate by way of remainder or springing use; she has no seisin in law, nor can she exercise any act of ownership before assignment.(*a*)

*Her title to be endowed is not of an undivided third of the entirety, but of a third part in severalty, which third [*335] part is unascertained till assignment; it bears no analogy therefore to the case of coparceners, or other persons becoming entitled to undivided shares.

The consideration of this subject is of practical importance, for although the title of Dower is consummated by the death of the husband, yet until actual assignment, that title affords no impediment to the validity of a recovery,(*b*) nor is it to be considered for any other purpose as an outstanding estate of freehold.

But although a title of Dower is for most purposes nothing more than a right of action, and consequently transferrable in no other mode than by release to the terre-tenant by way of extinguishment, yet it differs from all other mere rights of action in not being the result of any adverse *jus possessionis* acquired by the heir or feoffee, and as a consequence the mere possession of the heir or feoffee can never become a bar to the title of the wife.

It will also occur to the student in black letter law, that from the necessity for the concurrence on the part of other persons, a woman can never be *remitted to her Dower, previous to [*336] actual assignment.

If the wife hath the possession of the lands of which she is dowable as guardian in socage, she shall be *allowed* the third part of *the profits upon her account*, in allowance of her Dower in the mean time, but she shall not endow herself of the third part of the lands or tenements, *to hold as her freehold.*(*c*)

The entry of the wife upon her husband's death, without assignment, is by the books treated as an abatement,(*d*) and a dowress in under a void assignment, may be treated as a disseisor.(*e*)

The reason of the law in denying any right of entry in the wife, although her *title* is consummate, is obviously to be found in the injustice which would arise from permitting her to be her own judge of the particular parcels which she shall have for her Dower, or, as Chief Baron Gilbert expresses it, to "carve for herself;" while, on the other hand, the law, in favour of the widow, would not subject her to the inconvenience of holding an undivided part in common, for her Dower, where the nature of the property admitted of an endowment in severalty. To avoid both these evils, it became necessary to suspend her right of en-

(*a*) See Co. Litt. 34. *b*. 37. *a*.; Litt. sec. 43; Perk. sec. 416. But it has been held, that a mere right of dower, without an assignment, will gain the widow a settlement, for by Magna Charta she might remain forty days; and if irremoveable forty days, she would gain a settlement; but such settlement will not communicate itself to a second husband. Rex v. Inhabitants of Painswick, Burr Setl. Ca. 783.

(*b*) See 4 Bro. C. C. 525, per Lord Loughborough. And she must enter, or the seisin be actually delivered to her by the sheriff, before the freehold will be in her. Hargr. Co. Litt. 37. *a*. n. (1.) But, she may enter after seisin without any return by the sheriff. Palm. 266. Hargr. Co. Litt. 37, *a*. n. (2.)

(*c*) Perk. sec. 451; and see Co. Litt. 38, *b*. 39, *a*, *b*.

(*d*) Dal. 100 (*e*) 1 Burr. 111.

try until the certainty of the parcels which she should hold in Dower was ascertained, either judicially, by the officer of the court, or by the agreement of the dowress and the terre-tenant.

[*337] *It would seem to follow, on principle, that where from the nature of the husband's tenancy, or for other reasons, the wife is only entitled to be endowed of an undivided share, her right of entry would accrue immediately upon her husband's death. In one case indeed, which is to be met with in the books, it was said by Roll, Justice, that "where a feme cannot be endowed *per metas et bundas*, she may enter without assignment."(*f*) In practice, however, the author believes, the point is otherwise considered, upon the authority probably of the cases which have determined that a woman who has *obtained judgment* for her Dower, where, from the nature of the property, an assignment can confer no greater certainty than before, must nevertheless wait for an assignment before she can enter. Thus "if a woman bring a writ of Dower of six pound rent charge, and she hath judgment to recover the third part, albeit it be certain that she shall have forty shillings, yet she cannot distrain for forty shillings before the sheriff do deliver the same unto her. And so it is when the wife of one tenant in common demands a third part of a moiety, yet after judgment, she cannot enter until the sheriff deliver to her the third part, albeit the delivery of the sheriff shall reduce it to no more certainty than it was."(*g*) The reason, however, assigned by Lord Coke for these cases, is in terms confined to women who have *brought actions* for their Dower, and turns upon the nature of *the writ; "for (he remarks,) whensoever the writ demands land, rent, or other things *in certain*, the demandant after judgment may enter or distrain before any seisin delivered to him by the sheriff upon a writ of *habere facias seisinam*. But in Dower, where the writ demandeth nothing in certain, there the demandant, after the judgment, cannot enter or distrain, until execution sued."(*h*) Considering the inconsistency that would arise from holding the wife to be entitled to enter *before*, but not *after* judgment, the practice is probably right in treating her as having no right of entry in these cases before assignment, even if it be founded upon no better reason.

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It is also to be observed here, that where Dower has once been assigned in certainty to a woman, although she should be afterwards evicted by a person claiming under a prior title, yet if the estate of the person so claiming determines in her life-time, she will be entitled to enter without any new assignment. As, "if there be grandfather, father, and son, and the grandfather be seised of one acre of land in fee, and taketh a wife, and the father take a wife [and dieth,] and the grandfather dieth, and the son entereth and endoweth his mother, against whom the grandmother bringeth a writ of Dower, and recovereth, and hath execution, and the grandmother dieth, in this case the mother may enter into the land recovered by the grandmother against her, and retain the same

(*f*) Booth v. Lambert, Sty. 276.

(*g*) Co. Litt. 34, *b*. (cites 45 E. 3, 26. 48 E. 3, 36. 22 Ass. 87. 39 E. 3, 12. 37 H. 6, 38. 39 H. 6, 25. 1 H. 5, 8. Brev. 199. 30 E. 3, 30. 21 E. 4, 3. 40 E. 3. 22.)

(*h*) Co. Litt. 34, *b*.; and see Perk. sec. 416, where the same point is stated to be law before writ of dower brought.

land against the donee [son?] because she was endowed thereof by him; and so shall it be if the mother had recovered *against him in a writ of Dower."(*i*) Another reason is given by Lord Coke, namely, that the grandmother had in the land "an estate for term of her life, and the estate for the life of the grandmother is lesser in the eye of law, as to her [the mother,] than her own life;"(*k*) and consequently she had a reversion. [*339]

So also if, after judgment in Dower, the sheriff offer to give the demandant seisin of her third part, showing in certain the parcels, although she refuse to receive it, yet she may enter at any time after, because the certainty appears. But she shall not have an *alias habere facias seisinam*.(*l*)

As soon as Dower has been assigned to the widow by the sheriff, or by the owner of the land, and she has executed it by entry, she becomes seised of the immediate freehold,(*m*) either of the particular lands set out in Dower, if assigned by metes and bounds, or of an undivided third part of the entirety, if assigned in common. All the incidents of a freehold tenure consequently attach upon her tenancy, and for all purposes of title in which the concurrence of the freeholder is requisite, or the existence of a particular *estate of freehold is material to the deduction, her tenancy, to the extent of the lands assigned, must be taken into consideration accordingly. She must therefore join in making a tenant to the præcipe, for the purpose of suffering a common recovery, or otherwise the recovery will be void for her third part; and every real adverse action must be brought against her, as well as the person who has the freehold in the remaining lands or undivided parts, if the entirety is sought to be recovered. As the owner of a vested particular estate, she is also capable of a release in enlargement of her estate, from any person competent in point of title and privity to make that release; and she is of course competent to alien her own interest to a stranger by any of the modes of conveyance available for transferring an estate of freehold. Although in point of tenure, a dowress holds of the heir, yet, in point of title, she is *in* of the lands assigned to her by her husband, and not by the person making the assignment.(*n*) Although her right of entry is *suspended* till assignment made, her estate does not take its effect out of the ownership of the party assigning, but it is considered as a continuation of the estate of the husband, and although the heir entered, and had an actual seisin, between the death of the husband and the assignment of Dower, yet that intervening seisin does not disturb the continuity of the wife's title, for, as soon as her Dower is assigned, the law supposes her in by relation from the death of her husband, *and does away all mesne seisin, or as Coke expresses it, "the law adjudgeth no mesne seisin between the husband and the wife."(*o*) And by reason of this relation to the estate [*340] [*341]

(*i*) Perk. sec. 316 (cites 8 E. 3, 293.)

(*k*) Co. Litt. 31, *b*. (cites 8 E. 3, tit. Ass. 393. 13 R. 2. Dow. 55. 22 E. 3, 5. 8 E. 3. 3. 7 H. 6, 4.) Co. Litt. 42, *a*. (cites 8 E. 2. Ass. 393. 45 E. 3, 13.)

(*l*) Dy. 278, *b*.

(*m*) Co. Litt. 31. *a*. And of some things which are entire, and cannot be divided, although she shall be endowed of a third part of the profits only, yet she shall have the freehold of the third part; as of a mill. Gilb. Dow. 371, 397.

(*n*) 36 H. 6, Dow. 30; Co. Litt. 241. *a*.; Gilb. Uses, 356, 395.

(*o*) Co. Litt. 241. *a*.

of her husband, it is (as Mr. Watkins remarks,)(*p*) that a remainder limited on an estate in Dower (as where the heir endows his mother, and at the same time, limits a remainder over to another,) is void: for as the particular estate, and the remainders limited thereon must form together but *one* estate, the remainder limited on an estate in Dower cannot be good; as the estate in Dower arises from, and has relation to that of the husband, and reference to his death; and the remainder proceeds from the heir, and arises from the grant made by him; so that such heterogeneous portions can never form *one* estate. Another consequence of the wife's being in by her husband, and not by the heir, is, that an assignment of Dower by the heir is no consideration for any thing moving from the wife, and therefore if the heir assigns Dower unto his mother in exchange for another acre of land, it is said to be a void exchange.(*q*)

But although for most purposes, a dowress is *in* by her husband, yet a contrariety of opinion prevails in the old books whether she is *in* in the *per* or the *post;* namely, by force of the marriage agreement (in which case only she would, strictly speaking, appear to be *in* by the husband,) or by the general law of the kingdom. All the authorities [*342] are agreed that *tenant by the curtesy is *in* in the *post;*(*r*) and some of them place tenant in Dower on the same footing.(*s*) The majority of the old books, however, treat her as claiming by the marriage agreement,(*t*) a doctrine which was undoubtedly true, as applied to Dower *ex assensu patris*, and *ad ostium ecclesiæ*. The point seems to have been put upon its right ground by Serjeant Nudigate, in a case in Brooke,(*u*) where he said the estate of tenant in Dower is made by the law, notwithstanding that she is adjudged in by the baron, for yet this is by the law, and whether the baron will or not. And in the same case, Brooke, J. expressly took the distinction between tenant in Dower by the common law, and tenant in Dower *ex assensu patris*, and *ad ostium ecclesiæ*, observing, that the former should not be bound by uses [trusts] but the latter should, for they were in by the feoffee, while the other was in in the *per* by the baron, and *yet by the law*, and without the act of the baron. Some observations have already been made on this subject in another part of this work.(*v*) It remains only to be observed here that it is stated by Coke that "a tenancy in Dower by assignment of the heir doth work a degree, because she is in by her husband; but assignment of Dower by a disseisor worketh no degree, but is in the *post.*"(*w*)

[*343] *When, as in former times, an actual assignment of one third of the land in Dower was every day's occurrence, the consideration of the effect of such assignment upon the seisin as governing the descent, was often of vital importance to the deduction of titles, since such assignment did not merely turn the estate in the one third into a reversion, but in consequence of the rule that the dowress was in

(*p*) Watk. on Desc. 66, note; and see Finch's Law, 13.
(*q*) Perk. sec. 272.
(*r*) Gilb. Uses, 11, 171, 172; Co. Litt. 30. *b.* note (7.)
(*s*) Ibid. 171; Hob. 27; 1 Co. 122; Bro. Feoff. al uses, pl. 40.
(*t*) Ibid. 11, 172; Hard. 469; 7 Co. 73; Co. Litt. Hargr. 30, b. note (7.) 239, *a.*
(*u*) Bro. Abr. Feoff. al uses, pl. 10; and see 1 Leon. 61.
(*v*) Supra, p. 102. (*w*) Co. Litt. 239, *a.*

from her baron, and not by him who endowed her, the assignment had the effect of devesting, by relation, all mesne seisin in the one third which had attached between the death of the baron and the time of the assignment.(*x*) Hence the one third in Dower would devolve to the person who at the death of the dowress should be the heir of the baron, without regard to mesne seisins, while the other remaining two thirds would descend to the heirs of the person who successively acquired a seisin, governed by the rules of descent as to estates in possession. The old law books abound with cases on this head, and they uniformly establish the doctrine that the estate of the dowress, when assigned, takes effect by relation to the seisin of the husband.(*y*) An actual assignment of land in Dower so rarely happens at the present day, that the attention of the conveyancer is scarcely ever directed to this point. The consequences of the law, however, must still take effect where the facts do occur to call them into action.

*In point of tenure, a dowress holds of the heir, or person who has the reversion in the lands assigned to her, notwithstanding she is *in* by her husband, and not by the heir.(*z*) This point is said to originate in the principles of the feudal system, according to which, as a woman was incapable of performing her proportion of the services, a tenure was created in the dowress, as to her third, to hold *of the heir*, immediately from the death of the ancestor; "and the reason (says Gilbert) why the law created this as a tenure was that the heir might be obliged to do the service for it during the time of its continuance,(*a*) as he was obliged to do for all lands which he had given out in tenure, as well as those he held in demesne; and had there been no tenure, it had been cut off from the manor during the life of the wife, when the heir was a tenant and no lord of the manor."(*b*) [*344]

The assignment of Dower then was, for purposes of tenure, a species of subinfeudation, and this tenure continued after the statute of *Quia emptores*, since the heir does not part with the fee.(*c*)

And although the dowress could not, by reason of her incapacity, be contributory to the heir for the *military services, yet if he holds over by rent, she is attendant upon him by the rate and proportion of the rent which the land assigned unto her should bear.(*d*) As if there be lord and tenant by fealty and twelve pence rent, the tenant takes a wife, and dies, and his wife is endowed of the third part of the tenancy by the heir of the husband, she shall be attendant unto him for four pence.(*e*) [*345]

And if a woman is endowed of a manor, she shall pay all services to the heir as he pays over.(*f*)

(*x*) Bro. Desc. pl. 19, (cites 19 E. 2.) Bro. Dow. pl. 87.

(*y*) See Bro. Descent. pl. 19, 87. 8 Ass. 6. Vin. Abr. Dower (G. 2.) 3 Leon. 156. 8 Co. 40. Co. Litt. 15, *a*. Gilb. Ten. by Watkins, 27.

(*z*) Perk. sec. 424. F. N. B. 7. F.

(*a*) See Fitzh. N. B. 159 (A,) where it is said, "if the wife be tenant in dower of any land, she shall not be distrained to do suit for that land which she holdeth in dower, if the heir have sufficient land in the same county to be distrained for the same. And if she be distrained, then she shall have a writ *pro exoneratione sectæ ad curiam*." &c. See the form of the writ there.

(*b*) Gilb. Dow. 357, 364.

(*c*) Ibid. 357.

(*d*) Perk. sec. 424. Co. Litt. 31, *a*. n. (2.) 241, *a*. 1 H. 4. 4. *a*.

(*e*) Perk. sec. 430, and see sec. 425.

(*f*) Plowd. Qu. 90.

If the render be of an entire thing which cannot be apportioned, as of a horse, she shall be attendant unto the heir in rendering unto him a horse every third year; but if the heir holds by the service of a horse, *price forty shillings*, then she shall be attendant unto the heir for thirteen shillings and four-pence.(*g*)

But it has been said that the heir cannot distrain for her proportion of the rent.(*h*)

If the heir grant the reversion of the lands assigned in Dower unto a stranger, the tenant in Dower shall be attendant unto the grantee;(*i*) and if the husband had been disseised of the tenancy, and, after his death, the disseisor assigns Dower to the wife, in that case she shall be attendant unto the disseisor.(*k*)

[*346] *But the attendancy of the wife is only in respect of the charge over, and therefore if the lord release the services unto the heir, the wife shall not be attendant for any rent after the release.(*l*) And if there be no heir, or issue in tail, and the lord or donor enter for default of heirs or issue, the widow shall hold by the third part of the services of such lord or donor.(*m*)

But if the lord or donor determines the estate of the husband by his own act, as by purchase, she shall not render any services to him.(*n*)

The wife, when endowed of lands of which there is any existing lease for years, becomes the reversioner, and is entitled to the rent, or, as the case may be, a proportion of it.(*o*) If she is endowed only of part of the lands comprised in the lease, there will be an apportionment in law of the rent, and she may distrain for her part. So if she is endowed of the third part of a rent service of 3*l*., she shall distrain for 20*s*., and the heir shall distrain for the other two parts of the rent.(*p*)

[*347] But from the nature of her title it has been doubted whether a dowress can enter upon a lessee *for years for condition broken. In Gamock v. Cliff,(*q*) the condition was that if the lessee, his executors or administrators, should do any voluntary waste, the demise should be void and accounted none in law; and the wife of the reversioner, who was endowed of the lands demised, entered for waste done. It was moved if tenant in Dower, and so in by the law, not by the party, and so not privy, nor as assignee, could enter for the condition broken. The court was clearly of opinion that the words of the condition being *Quando dimissio predict. erit vacua*, &c. and no clause of re-entry being reserved, so that privity was not requisite, the dowress might take advantage of the condition. And they cited the year books 11 H. 17, and 21 H. 7, 12, where the words of a lease were that upon the not going to Rome that the lease should cease, it was holden that the grantee of the reversion by the common law should take advan-

(*g*) Perk. sec. 434. (*h*) 1 H. 4, 4, *a*. per Cokaine.
(*i*) Perk. sec. 427, (cites H. 32 E. 3. Dow. 131.) Bract. 317.
(*k*) Perk. sec. 426, (cites 12 Ass. pl. 20,) and see the continuation of the section for the remedy of the disseisee in that case, and the mode in which the attendancy may be restored to him.
(*l*) Perk. sec. 430, (cites H. 3 E. 3. 9.)
(*m*) 7 Co. 73. Co. Litt. 241, *a*. Hughes' Writs, 144. See Plow. Qu. 49.
(*n*) Bro. Tenures, pl. 33, 82. Extinguishm. 31. Hughes' Writs, 144, 145.
(*o*) 1 Roll. Abr. 678. Winch. 80. Cro. Eliz. 564. Anon. Ow. 32.
(*p*) Bro. Avowry, pl. 139. (*q*) 1 Leon. 61.

tage of such a condition; contrary where the condition was conceived in words of re-entry.

As a woman who is endowed of a manor is *dominus pro tempore*, she, like any other person having a particular estate, may grant copies, and if such copies pursue the custom, they will be binding upon the persons entitled to the inheritance; for the copyholder is in by the custom and does not derive his estate out of the lord's estate only.(*r*)

*It is said by Fitzherbert that if a tenant of the manor whereof she is endowed dies without heirs, she shall have a [*348] writ of escheat.(*s*) On the contrary it is stated by Perkins, that, "if there be lord and tenant by fealty and twelve pence rent, and the lord take a wife, and dieth, and his wife is endowed of the third part of the rent, and the tenant dieth without heir, so as the tenancy doth escheat, in this case the wife shall not be endowed of the tenancy, notwithstanding that it come in lieu of the seignory; because it was not in the possession and seisin of the husband; but she shall retain the rent which was assigned unto her in Dower as a rent-seek, and shall distrain of common right.(*t*)

These propositions are probably reconcileable. The observation of Fitzherbert that a tenant in Dower of the seignory shall have a writ of escheat, assumes that she is endowed of the entire seignory, *qua* seignory, and being *dominus pro tempore*, must, like any other tenant for life, have those rights and remedies which are incident to the enjoyment of the seignory. The case stated by Perkins merely supposes the wife to be endowed of the third part of the rent as parcel of the seignory, and as a substantive hereditament, while the seignory itself remains in the heir.(*u*) It may, however, be doubted whether the law is correctly stated in saying that the rent shall continue as a rent-seek, since that rent is determined *by way of collateral limitation [*349] and there does not seem any pretence to charge the heir claiming by escheat with a rent issuing out of the tenancy.(*v*)

It has been held that if a feme is endowed of a third part of a manor to which franchises are appendant, she shall not have the third part of the franchises, for these are not divisible; otherwise if she has the whole manor in Dower.(*w*)

If a woman is endowed of a manor, *eo nomine*, to which common is appendant, she shall have common appendant to her third part; but it is said that if she is endowed of two acres of land, parcel of the manor, in allowance of all the manor, she shall not have common appendant unto these two acres; for during the time they are in possession of the woman they are not parcel of the manor, and the common is appendant unto the *manor*.(*x*)

(*r*) 4 Co. 23. Co. Litt. 58, *b*. But she must be endowed specifically of the manor, naming it. Brook's case, Gouldsb. 37.

(*s*) Fitzh. N. B. 144, (M.)

(*t*) Perk. sec. 323, (cites E. 33 E. 3. 137.)

(*u*) And see Brooke's case, Gouldsb. 37, that in order to enable a dowress to grant copies she must be endowed specifically of the manor, naming it.

(*v*) See p. 163, supra.

(*w*) Bro. Dow. pl. 102, but see Cro. Jac. 620, 621.

(*x*) Perk. sec. 344. It seems that a woman shall have a writ of Dower of what is appendant or appurtenant to the land which she holds in Dower if she is deforced thereof. Gilb. Uses, 371. And such appendants need not be specifically demanded in the writ by which

When a rent is granted to a widow out of lands of which she is dowable, in lieu of her Dower, the law construes this to be a rent-charge, and she may distrain of common right.(*y*)

[*350] *We have already seen that a woman entitled to Dower takes subject to all incumbrances and charges created by the husband previous to the marriage. And as to such of these charges as are in their nature redeemable; her interest in the land confers on her the right of exercising the privilege of redemption. This point is particularly applicable to mortgages for years,—for as to mortgages in fee, the question cannot arise, a woman not being dowable of a mere equitable estate, as we have already seen.(*z*) It is her legal interest in the reversion expectant upon the mortgage term, which, in this instance, carries with it, according to the known rules of courts of equity, an equivalent interest in the equity of redemption, and the consequent right of discharging the incumbrance, or enjoying subject to that incumbrance, upon the same footing as any other tenant for life. Thus in Palmes v. Danby(*a*) (which was the case of a mortgage for years, though that fact is not stated in the report)(*b*) one question was whether a dowress had a right to redeem. And the Lord Keeper declared his opinion to be that she had, paying her proportion of the mortgage money, and to hold over for the rest; and he distinguished it from Lady Radnor's case, because there it was a satisfied term, and the husband (he observed) had a power to bar her by assigning it over; but here it was only a mortgage, and against the heir.

[*351] Where the wife has joined in a fine, on a mortgage *for years made by the husband subsequent to the marriage, as she continues dowable of the reversion,(*c*) (unless indeed the uses of the fine were declared, subject to the mortgage, so as to prevent Dower), she is in the same situation as if the mortgage had been made before marriage, and has the same right of redemption.

But where the mortgage is in fee, the fine operates as an absolute extinguishment of her title of Dower, for no new title arises by reason of any legal reversion; and she can no more redeem the mortgage in that case, than if it had been made before marriage. It seems, however, even in this case, that a wife may be let into her Dower in equity, if she is included by name in the proviso for redemption, and the transaction does not afford evidence to a court of equity of an intention to settle the equity of redemption upon her. The case from which this proposition is drawn has been already stated.(*d*)

A dowress, like an heir or devisee, has of course a right to have the personal estate of her husband, as far as it will go, applied in discharge of mortgages, and other debts contracted by the husband, which are charges upon the land which she holds in Dower. And even where the personal estate is insufficient to discharge the debt, it would seem that in some cases, if not in all, she has the privilege of having the lands which remain in the heir charged therewith, in exoneration of the land

she claims the land to which they are appendant, but are included in the land *eum pertinentiis*. Arg. Pruett v. Drake. Cro. Car. 301.

(*y*) Noy, 155. Keilw. 104, *a*. Perk. sec. 323.
(*z*) See p. 137, supra.
(*a*) Pr. Ch. 137.
(*b*) Per Sir J. Jekyll in Banks v. Sutton, 2 P. W. 716.
(*c*) See p. 196, supra.
(*d*) See p. 208, supra.

assigned *to her in Dower.(e) Thus if the husband before marriage becomes indebted to the crown, and afterwards his [*352] wife is endowed, and the sheriff distrains on her Dower for the husband's debt, she may have a writ directed to the sheriff, commanding that he do not distrain the wife for the king's debt; and she may have such writ out of the Chancery directed to the Treasurer and Barons of the Exchequer, commanding them that they inquire thereof, and if they find the same, that they surcease and discharge the wife, with a proviso in the writ, *Provided that those debts be levied upon the executor or heir of the aforesaid A., and upon the tenants of the lands which were his, and which of right ought to be charged therewith, as is just.* There is another form of writ in the register for tenant in Dower, with these words in the end of the writ, *Yet so long as the heirs and executors of the testament of him the said A. have not sufficient distress to render to us those debts*, &c.(f)

It has been thought that the wife should not in any case be distrained for the king's debt, at whatever time contracted;(g) and the opinion was probably *founded on the general terms of the common writ, [*353] properly used where the debt was contracted *subsequent* to the marriage, and which is as follows:—

The King to the Sheriff, &c.—Whereas according to the law and custom of our realm of England, women ought not to be distrained to pay the debts of their husbands in the lands and tenements which they hold in Dower of the gift of their husbands, or which are of their own inheritance, or which they purchased to themselves, and you distrain B. who was the wife of A. in her lands and tenements which are holden in Dower of the gift of the aforesaid A., and which were also of the inheritance of her the said B. as we have received information from her complaint: We command you, that you do not cause her the said B. to be distrained in her lands and tenements which are holden in Dower, or which are of her own proper inheritance, or of the purchase of her the said B. to pay the debt of the said A. some time her husband, against the law and custom aforesaid; and the distress which, &c. cause to be delivered to her, &c. Witness, &c.(h)

Chief Baron Gilbert, after adverting to the language of the different writs, puts the point upon its true ground, when he observes, that "the true distinction of these cases is, that if the debt to the King be subsequent *to the marriage, then the wife's Dower being a con- [*354] tract for infeudation, at the very time of the marriage, and which binds the lands, the assignment of Dower over-reaches the charges

(e) "If the husband's goods be not sufficient for payment of his debts, the heir must discharge Dower of the burden, &c. for he is the widow's warrant of her Dower, and ought to follow for her county court, court leet, and hundred, &c. that she may see to her house, and nurture of her children." Woman's Lawyer, 1632, p. 289 (cites Bracton).

(f) F. N. B. 150, (Q). 46, (G). Gilb. Uses, 407—412.

(g) Dos, the very name, doth import a freedom; for the law doth give her therewith many freedoms, *secundum consuetudinem regni mulieres viduæ*, &c. *debent esse quietæ de tal... giis*, &c. And tenant in Dower shall not be distrained for the debt due to the king by the husband in his life-time in the lands which she held in Dower. And other privileges she hath, of all which Ockham yields this reason, "*Doti ejus parcatur quia præmium pudoris est.*" Co. Litt. 31, *a.* (cites cl. 11 H. 3. n. 17. Regist. 142, 143. Ockham. f. 401. and see 2 Eq. Ab. 382, n.

(h) F. N. B. 150, (Q).

by debt of the King; for if the husband could not alien, during the coverture, so as to defeat the wife's infeudation, he could not make any other charges that would impeach it; and therefore, the wife there may have a general prohibition, since the King's debt does not affect the lands; but if the King's debt was before the marriage, then the contract for infeudation was subject to the burthen of the King's debt; and therefore, there she can only have a special prohibition, with an *ita quod* that there are lands in the hands of the heir, or chattels in the hands of the executor, to answer the King's debts; for if there be not, then the King may levy the whole debt upon the dowress, and she must come upon the feoffees of her husband, who are equally liable to contribution; for the husband, by subsequent alienation, cannot put such a disadvantage upon the crown, that has given him credit, as to force the crown to bring in every *alienee* in order to be paid by them; but the King has a right to seise the lands in whosesoever hands he finds them, if such person comes in subsequent to such charges."(*i*)

If the husband sows the ground, and dies, and the heir assigns the land sown to the wife for her Dower, she shall have the corn, and not
[*355] the executors of the *husband.(*k*) This is an instance of the peculiar favor shown to the tenant in Dower above any other tenant for life, who are never put into possession of lands which are sown.

It was owing to this reason, that at the common law a tenant in Dower could not devise corn which she had sown, nor did it go to her executors, but became the property of the person in reversion; but now, by the statute of Merton, 20 Hen. III. c. 2, the representatives of a dowress, like those of any other tenant for life, will be entitled to emblements, and she may devise the emblements.(*l*) And if tenant in Dower sows the land, and takes baron, who makes his executor, and dies, before severance of the corn, the feme shall have the crop, and not the executor of the baron. Otherwise, if the baron sows the land, and dies before severance; there the executor shall have the emblements; and the reason is said to be, that he who did the labour and costs of the emblements shall have them.(*m*)

"If two tenants in common be of land in fee, and one of them taketh a wife, and dieth, and his wife is endowed, and she and the other tenant in common sow the land, and afterward she maketh her executors and dieth, the corn not being severed, her executors shall have the corn in common with him who held in common with the tenant in Dower."(*n*)

[*356] *If a dowress leases the land which she has in Dower for years, and dies, her executors shall have the rent which was in arrear at her death, and not the heir, for he is a stranger to the lease, and by her death the lease is void.(*o*)

If the wife be endowed of lands, of which the husband was tenant in common, she must stock the land proportionally with the other tenants in common;(*p*) and it is apprehended she must contribute towards the

(*i*) Gilb. Dow. 411.
(*k*) 2 Inst. 81. Fisher v. Forbes, 9 Vin. 373, pl. 82; 2 Eq. Ab. 392; Dy. 316. *a.*
(*l*) See 2 Inst. 81; Keilw. 125; 2 Danv. 766, pl. 27; Perk. sec. 522; Co. Litt. 55, *b.* n. (3.) Bro. Emblements, pl. 22 (cites Fitzh. Devise. 25).
(*m*) Bro. Emblem. pl. 26 (cites Lib. Fundamenti Legum, f. 72).
(*n*) Perk. sec. 523. (*o*) Bro. Rents. pl. 16; Bro. Leases, pl. 19.
(*p*) Gilb. Dow. 397.

repairs.(*q*) But whether the reversioner can maintain a bill in equity to compel a dowress who has had lands specifically assigned to her, to repair, is probably doubtful.(*r*)

It seems too, that a woman who is endowed of the third part of the profits of an office, shall contribute a third part of the charge of the office; as in the case of a bailiwick.(*s*)

We have already seen that she must contribute to rent services.(*t*) So also it is said that if there be grandfather, father, and son, and the grandfather dies, and the father enters, and assigns Dower to the grandmother, *who afterwards surrenders to him, *paying ten pounds per annum*, and the father dieth, and the wife is [*357] endowed of the land, she shall pay to the grandmother so much of the rent as belongs to her proportion in Dower.(*u*)

The estate of the dowress being for her life only, is, generally speaking, subject to the same restrictions as any other estate for life. Thus she cannot lawfully commit waste;(*v*) and it is apprehended, that she is punishable not only for *voluntary*, but also for *permissive* waste, though it escaped the research of Mr. Hargrave, as it has that of the author of this treatise, to find any authority to that effect.(*w*) But it may be presumed, that the statute 6 Ann. cap. 31, sect. 6, exempting *all persons* from actions for accidental fire in any house, except in the case of special agreements between landlords and tenants, would be construed to extend to a tenant in Dower.

If tenant in Dower cut down timber-trees, they are the property of the heir or reversioner, and he may take them;(*x*) but if a house falls down *per vim venti*, in the time of tenant in Dower, she has a special property in the timber to rebuild the like house for her habitation, and if she fells a tree for reparation, she has a special property to that purpose in it, but she cannot give or sell the tree so felled.(*y*)

*So also if she dig unopened mines, it will be waste: but she may work mines or coal-pits which were opened in the [*358] husband's time.(*z*)

But if tenant in Dower takes husband, who commits waste and dies, the feme shall not be punishable for this.(*a*)

But she shall answer for waste done by a stranger, for he in the reversion cannot have any remedy but against the tenant, and the tenant has remedy over against the wrong doer, and shall recover all in damages against him, and by this means the loss shall light upon the wrong

(*q*) Of the writ 'De reparatione facienda,' between tenants in common, &c. See Fitzh. N. B. 295; and see 1 Vern. by Raithby, 219. n.

(*r*) In Wood v. Gaynon, Ambl. 396, a bill to compel a tenant for life to repair, or to have a receiver appointed with directions to repair, was dismissed as being without precedent. But it seems that in taking accounts, a tenant for life, though without impeachment of waste may be charged with sums for the repairs of houses on the estate. See Parteriche v. Powlet, 2 Atk. 383.

(*s*) Perk. sec. 312. (*t*) P. 345, supra.

(*u*) Hughes' Writs, 173 (cites M. 45 E. 3. 13.)

(*v*) Anon. Ow. 36. (*w*) Co. Litt. 57, *a*. n. (1.)

(*x*) Com. Dig. Biens. H.; Al. 81; 4 Co. 62, *b*.

(*y*) 11 Co. 82; Cro. El. 784; 5 Co. 13. *b*.; and see 2 P. W. 242, for qualification.

(*z*) Gilb. Dow. 391, 1 Taunt. 411; and see p. 117, 259, supra.

(*a*) 15 H. 3. Fitzh. Waste, 133. But contra said to be held in Atkins v. Glover, MS. note by Serjeant Hill in 22 Vin. Abr. 446, Linc. Inn Library.

doer. But if the waste is done by the enemies of the King, the tenant shall not be answerable, for she has no remedy over against them.(*b*)

It is said that if a woman be endowed of a manor, and a copyholder thereof commits waste, an action of waste lies against the tenant in Dower.(*c*)

The legal remedy against a dowress committing waste, is either by an action of waste, properly so called, or an action on the case in the nature of waste.(*d*)

Even before the statute of Gloucester, an action lay by the heir against the tenant in Dower at common *law, for committing waste;(*e*) and if the heir was apprehensive that the dowress intended to commit waste, he might, before any waste done, have a prohibition directed to the sheriff that he should not permit her to do waste.(*f*) And she was punishable by attachment thereupon, if after that she did waste.(*g*)

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But if the heir granted over the reversion, his assignee had no remedy for waste done by the tenant in Dower at common law, by reason that the privity was destroyed, but this was helped by the statute of Gloucester, 6 E. I. cap. 5.(*h*)

And in respect of the privity between the heir and the tenant in Dower, the heir shall bring his action of waste against her notwithstanding she grants over her estate, and as well for waste committed by her as her grantee, and he shall recover the place wasted against the assignee in that action, and damages against the tenant in Dower, who shall take her remedy over.(*i*) But as tenant in Dower can hold *of none but the heir, and his heirs by descent, the assignee of the heir shall not have his action of waste against the tenant in Dower who has granted over her estate, but against her assignee, for by the grant of the reversion the privity is destroyed.(*k*) But if the *feoffee of the baron* endows the feme, and she assigns over her estate, waste lies for him against the feme; for (says the book,) the plaintiff shall not suppose in his writ that she held in Dower of him *ex assignatione*, but only that she held in Dower of his heritage.(*l*)

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If tenant in Dower leases for her life to him in reversion within age,

(*b*) 2 Inst. 303.

(*c*) 2 Inst. 303 (cites 32 E. 3. Wast. 104.)

(*d*) But it seems case does not lie for permissive waste. Gibson v. Wells, 1 New Rep. 290.

(*e*) Bro. Waste, 139 (cites Dr. and Stud. l. 2,) pl. 88 (cites 21 H. 6. 38.) 2 Inst. 303, 145, where see the reason why prohibition lay at common law against tenant in dower, and not against tenant by the curtesy. But see Ib. 299, 301.

(*f*) Co. Litt. 53. *b.*; 2 Inst. 299, 300, 145.

(*g*) F. N. B. 55. (C.)

(*h*) 2 Inst. 301; 11 Co. 83, *b.*; Co. Litt. 316, *a.* 53, *b.*; 3 Co. 23, *b.*

(*i*) F. N. B. 55. (E.) 12 H. 4. 14; 30 E. 3. 16, *b.*; 38 E. 3, 23; 2 Inst. 301; 3 Co. 23. *b.*; 9 Co. 142. *a.*, Anon. Brownl. 239; Bro. Waste, pl. 76 (cites 38 E. 3, 23.) "And the reason wherefore at common law the action of waste did lie against the tenant in dower, or tenant by the curtesy, albeit they had assigned over their estates, was, because no action of waste by the common law lay against the assignee for waste done after the assignment; therefore the action of necessity did for such waste (after the assignment,) lie against the tenant by the curtesy, or tenant in dower, which law continues to this day." 2 Inst. 300.

(*k*) Co. Litt. 54, *a.* 316, *a.*; 2 Inst. 301; 3 Co. 23, *b.*; F. N. B. 56 (E. F.)

(*l*) F. N. B. 56 (E) n. (*b*) (cites 38 E. 2.) See also F. N. B. 55, (E.) n. (*a*;) and Dy. 206, *b.*

who never takes the profits, but at full age disagrees to the lease, he may have an action of waste for waste committed in the mean time.(*m*)

The action of waste is now become nearly obsolete, having given way to the more expeditious and eligible remedy of an action on the case in the nature of waste.

An injunction may of course be obtained in equity against a tenant in Dower committing waste, upon the same grounds as against any other tenant for life.

By the common law, a tenant in Dower was under the same restraints respecting alienation as other *tenants for life; and if she aliened in fee, or for the life of another, or in tail, the heir [*361] might after her death recover the land by a writ called in the books a writ of entry *ad communem legem*,(*n*) to distinguish it from the writ *in casu proviso*, to be presently noticed. But where tenant in Dower aliened by feoffment, and the feoffee died seised, whereby the entry of the reversioner was tolled, he could have no writ of entry *ad communem legem* till after the death of the dowress. But by the statute of Gloucester, 6 Ed. I. c. 7, it is enacted, "that if a woman sell or give in fee or for term of life [of another] the land that she holdeth in Dower, the heir, or other to whom the land ought to revert after the death of such a woman, shall have present recovery to demand the land by a writ of entry made thereof in the chancery."(*o*)

Notwithstanding this statute, if tenant in Dower aliened in fee with warranty, and died, the warranty descending upon him in reversion barred him; for the statute of Gloucester did not provide against collateral warranty of tenant in Dower. But by the statute 11 Hen. VII. c. 20, alienations, releases, and confirmations, with warranty, by a tenant in Dower, either alone, or with a second husband, except for the term of her own life, are made a forfeiture of her estate, and the same are declared void.(*p*) *If, however, the alienation is made during [*362] coverture, the statute saves to her the right of re-entry upon the heir or reversioner after the death of her husband.

It is said to have been adjudged, that if a woman who has title of Dower, before she is endowed, enters, and levies a fine, it is within the forfeiture of the statute, although she is not tenant in Dower.(*q*)

We have already seen that a dowress is not affected by any incumbrances or charges created by the husband subsequent to the attachment of the title of Dower. Therefore, "if a woman have lands which she holdeth in Dower, or of joint purchase with her husband, or of her own inheritance, if the sheriff have process out of the Exchequer to levy the husband's debts, which he oweth unto the King, or if the sheriff have process out of another court to levy debts due by her husband to another person, if the sheriff will distrain in the lands which the wife holdeth, &c. the wife shall have a writ unto the sheriff that he do not distrain the wife, who holdeth such lands, for the debt of the husband.(*r*)

(*m*) 30 E. 3. 16; F. N. B. 55 (E.) n. (*a*.) (*n*) F. N. B. 207.

(*o*) 2 Inst. 309; and see Shep. T. 125, 148; F. N. B. 205 (M.) where see the form of the writ, which is called the Writ of Entry *in casu proviso*.

(*p*) And see 32 Hen. VIII. c. 36. sec. 2; Co. Litt. 365, *b*; Litt. sec. 725, 726, 727. Shep. T. 194, 15.

(*q*) Per Rhodes, J. in Barker v. Taylor, 2 Leon. 168.

(*r*) F. N. B. 46; Gilb. Uses, 407. See the form of the writ, *supra*, p. 353.

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*CHAPTER XVII.

Of the circumstances under which a DOWRESS *shall, or shall not have the benefit of an* ATTENDANT TERM, *and of the protection afforded to* PURCHASERS *by assignments of terms.*

It has been already shown that upon a recovery of Dower at law, where there is an existing term of years, prior in point of title to the Dower, judgment is given of the reversion and rent, with an immediate execution, if there be any rent reserved upon the term; and of the reversion, with a *cesset executio* during the term, if there be no rent reserved thereon.(*a*) At law, every existing term is necessarily supposed so be a term in gross, and no inquiry can take place there as to the purposes for which the term was created, or the extent to which the owner of the reversion may be beneficially interested therein; but it having been once recognised and adopted as a principle by courts of equity, that a term which at law is a term in gross, may in equity, by express declaration, or even by implication, become attendant upon the reversion, that is to say, be held in trust, not for the person and *his personal representatives*, in whom the beneficial ownership of the term and the inheritance should first unite, but for that person, and all others who from time to *time should become interested in the inheritance, to the exclusion of his or their personal representatives, it necessarily became a question, whether a dowress who had obtained judgment at law of the reversion, with either an immediate or a stayed execution, should not in equity be, in the first case, let into possession by virtue of the trust which was then become *executed* for her benefit and, in the second case, be relieved from the effects of the stay of execution at law, and assisted to obtain the immediate benefit of her legal title. According to the doctrines of courts of equity, "every description of ownership (as it was observed by the late Master of the Rolls in Maundrell v. Maundrell,)(*b*) shall in its order, degree, and proportion, have a use in the term, commensurate with the interest existing in the inheritance. Therefore, when Dower arises, the term in a proportion is just as much attendant upon that interest, growing out of the inheritance, as before it was attendant upon the inheritance during the husband's life."

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With the exceptions which will be hereafter noticed, in favour of purchasers, it is now distinctly settled that courts of equity *will* relieve the dowress in the case of satisfied terms, although several cases have at different times been decided to the contrary;(*c*) and the judges were for some time much inclined *to distinguish between the cases of a dowress, and a jointress; the latter coming in by the act of the party, while the former was in in the post, and by operation of law; and therefore, as they thought, not entitled to the benefit of

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(*a*) See p. 294, 300, supra. (*b*) 7 Ves. 578.

(*c*) Pheasant v. Pheasant (1671,) cited 1 Vern. 358, 341; but see the report, 3 Ch. Rep. 69; and 2 Freem. 212; Tiffin v. Tiffin (1681,) 2 Freem. 66; Radnor v. Rotheram (1696,) Pr. Ch. 65; 2 Freem. 211; Brown v. Gibbs, Pr. Ch. 97. 2 Freem. 233; Williams v. Wray, 1 P. W. 137.

the attendant term. This objection is, however, now considered as of no validity;(*d*) nor does any distinction appear to be admitted as to equitable relief, between the case of a dowress, who has had *execution* of her judgment at law, and so become to all intents and purposes tenant for life of the reversion, and entitled to be let into possession as against the trustee of the term, and the case of a dowress who has recovered judgment with a stay of execution,(*e*) and consequently cannot entitle herself even to the ownership of the reversion; although it might certainly have been open to contend that the cases afforded a distinction; since in the former instance, the dowress merely comes into equity to have the trust executed for her benefit, as the complete owner *pro tempore* of the reversion, by virtue of her recovery at law; while in the latter case, she comes to have a title made good in equity, which is not available at law, during the existence of the term, or as it has been elsewhere *expressed, to be relieved against that very judgment upon which she founds her title. [*366]

The preceding observations suppose the term to be satisfied, and attendant on the inheritance, either by implication, or express declaration; but although the term is not satisfied, yet if it were created for a particular purpose, as a mortgage, or for securing portions, &c. as equity considers the termor, subject to the charge, as a trustee for the owners of the inheritance, such a term will in equity no otherwise obstruct the enjoyment of a dowress, than as may be necessary for purposes of the charge. Therefore, if the termor is in possession, the dowress, if she has obtained execution at law, or been relieved in equity against a stay of execution, may, by redeeming the mortgage,(*f*) or paying the portions, &c. entitle herself to the immediate possession, and proceed against the heir or reversioner for contribution;(*g*) or if the termor is not in possession, she will be entitled to enter and enjoy, or receive the rents and profits, subject to the charge.

The cases from which the above propositions are to be gleaned, may be shortly noticed as follows.

In Snell v. Clay(*h*) (1695), the plaintiff, as tenant by the curtesy, brought his bill to be relieved against *a term for years that was assigned in trust to attend the inheritance, and had been set up by the heirs at law in bar to his title; and it was decreed accordingly at the Rolls, with costs at law and in equity; and that the term should not be made use of against him by the heirs at law, and the decree afterwards confirmed upon appeal to Lord Keeper Somers. [*367]

In Hitchens v. Hitchens,(*i*) Samuel Hitchens made a mortgage for five hundred years, and devised his real estate to his son Giles Hitchens in tail, with remainder over. Giles married the plaintiff Silvestra, who

(*d*) And see Attorney General v. Thruxton, 1 Vern. 340, where it was adjudged, that the inheritance escheating, though the King by escheat comes in in the *post*, yet he should have the benefit of an attendant term. It was said by Lord Chancellor Jefferies in that case, that the King was not barely in in the *post*, but in the *per* also, for the term went with the inheritance by the express limitation of the party.

(*e*) As was the case in Bodmin v. Vandebendy, 2 Ch. Ca. 172 (as remarked by the reporter,) and Dudley v. Dudley, Pr. Ch. 243.

(*f*) See p. 350, supra; and see the third resolution in Radnor v. Rotheram, 2 Freem. 211.

(*g*) As against the personal estate of the mortgagor, she is likewise entitled to have the land exonerated from the mortgage debt. See p. 351, supra.

(*h*) 2 Vern. 324.

(*i*) 2 Vern. 403; Pr. Ch. 133.

after his death recovered her Dower at law, but was kept out of possession by reason of the mortgage, upon which 100*l.* was still due. Upon a bill filed by her against the remainder-man, and the executors of Samuel Hitchens, to have the benefit of her Dower, it was decreed that she should be let into possession of her Dower, exonerated from the mortgage and that the defendants, the trustees, and executors of Samuel Hitchens, should out of the monies in their hands, pay off and discharge the said mortgage, and a perpetual injunction was awarded to stay any action at law that might be brought against the plaintiff Silvestra Hitchens, on account of the said mortgage.(*k*) The latter part of this decree appears to have proceeded on the ground that the dowress had a right, as against the personal estate of Samuel Hitchens, to have the lands exonerated from the mortgage debt.(*l*)

[*368] *In Dudley v. Dudley(*m*) (1705), lands were settled to the use of trustees for ninety-nine years, remainder in tail, and the trusts of the term were declared to be to raise annuities for certain persons, and subject thereto, to permit the persons entitled to the freehold to receive the surplus rents, and profits, and the wife of the tenant in tail recovered Dower at law, with a *cesset executio* during the term, it was decreed in equity that the dowress should have the benefit of the trusts of the term as to a third part of the profits above the charge of the annuities, during their respective continuance, and that the trustees should account to her for the third part accordingly from the death of her husband, and from time to time for the future during the term, and the term to stand charged therewith during her life. Sir John Trevor, Master of the Rolls, remarked that "the term was expressly attending, and waiting on the freehold and inheritance, nay waiting during the very charge, as to the surplus of the profits. The dowress's husband had an undeniable right to the surplus of the profits, and had an estate tail in him, and the dowress under him had a good equity to have her Dower, because the trust of the term was expressly to attend the person that should have the freehold, and her husband had the freehold, and she had the freehold,(*n*) and the words of the declaration of the

[*369] trust were thereby literally satisfied; though he was of *opinion that if the words had been in general to attend the inheritance, it would have been the same thing, and she had a right to this trust within the description."(*o*)

In Williams v. Wray(*p*) (1710), the plaintiff brought a writ of Dower and recovered judgment by default: the defendant Sir B. Wray preferred his bill to be relieved against the judgment in Dower, on this equity, that as to part of the lands (the five parishes in the pleadings mentioned) there was a subsisting term for ninety-nine years prior to her marriage, and that the legal estate of that term was in one Mr. Bulkley as a collateral security for his quiet enjoyment of certain lands called Lecquidissa; that, subject to this collateral security, the term was declared in trust to attend the reversion and inheritance, which was in

(*k*) Reg. Lib. cited 2 Vern. by Raithby, 405.
(*l*) See p. 351, supra. (*m*) Pr. Ch. 241. 1 Eq. Ab. 219.
(*n*) This is not exactly correct, for she had recovered only with a stay of execution, and therefore could not acquire the freehold at law.
(*o*) Pr. Ch. 243, 545.
(*p*) 1 P. W. 137. 2 Vern. 378. Pr. Ch. 151. 1 Eq. Ab. 219.

Sir William Williams, the plaintiff's late husband, who devised these lands to Sir B. Wray for life with remainders over; and that his guardian had let the plaintiff take judgment at law without setting up the term. Lord Keeper Wright, upon the authority of Lady Radnor's case, (not distinguishing between a devisee and a purchaser), decreed that the plaintiff Lady Williams was not dowable; but afterwards upon a bill of review brought by Lady Williams, and on solemn argument before Lord Keeper Harcourt, he reversed Lord Keeper Wright's decree, and ordered that Lady Williams having recovered Dower at law, this trust term that *Sir B. Wray had set up should not [*370] stand in her way in equity.

Consistently with the principle established by the above cases, it was decided in Duke of Hamilton v. Lord Mohun,(*q*) that where a bill is brought by a son against the executors of the mother as guardian, for an account of mesne profits, and it appears that the mother was entitled to Dower of an estate which was in mortgage for years, but the mortgagee had never entered, that "there ought to be an allowance of the third part of the profits for Dower to the mother or her representatives; and that the heir could not insist upon the term to prevent her Dower. And as to the want of a formal assignment of Dower, (for it appears there was no recovery of Dower in this case,) that is nothing in equity for still the right in conscience is the same, and if the heir brings a bill against the mother for an account of profits, it is most just that a court of equity should, in the account, allow a third of the profits for the right of Dower."

In Squire v. Compton(*r*) (1724) the husband was seised in fee, subject to a prior mortgage for years, and became bankrupt, and died, and upon a question between the wife and the assignees of the husband, it was decreed that the wife should be let into her Dower, keeping down the interest of a third part of the mortgage. In this case it would appear that the assignees had taken an assignment of the [*371] *mortgage after the death of the husband, but that was not allowed to make any difference.(*s*)

In Dormer v. Fortescue(*t*) (1744) upon a question as to rents and profits, Lord Hardwicke observed, that if a widow is entitled to Dower of an estate upon which a term for years was standing out, and she had her title of Dower out of the reversion of the term, and she comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time of her title accrued, and will set the term as a satisfied one out of the way.

The especial favour shown by courts of equity to purchasers for valuable consideration has introduced an exception to the rule that a dowress shall have the benefit of a satisfied or trust term, which is of considerable importance in practice. This point was first established in

(*q*) 1 P. W. 118. (*r*) 9 Vin. Abr. 227. 2 Eq. Ab. 387.

(*s*) It was insisted that creditors and assignees of commissioners of bankrupt stand only in the place of the bankrupt; and since such an assignment to the bankrupt himself or his heir, would not protect the estate from title of dower in the hands of the heir, neither will it protect the estate in the hands of the creditors of the bankrupt, or the assignees of the commissioners, and this differed the present case from the case of Radnor and Vandebendy. The decree appears to have adopted this position.

(*t*) 3 Atk. 131.

the case of Bodmin v. Vandebendy,(*u*) which still continues the leading authority on this head.

[*372] The facts of this case were that the Earl of Warwick *upon marriage of his son, settled part of his estate upon his lady for a jointure, and after failure of issue male, limited a term of ninety-nine years to trustees to be disposed of by the Earl either by deed or will, and for want of such appointment, then in trust for the next in remainder, and then limited the whole estate in such manner as that a third part of a moiety came to Lord Bodmin the plaintiff's husband in tail general. The son died without issue; the Earl by his will appointed the lands to his Countess for so many years of the term as she should live, and to her executors for one year after her death, and charged the term with several annuities, some of which were satisfied and others remained in being. Lord Bodmin, being in possession,(*v*) sold the estate to Vandebendy for 4,400*l.* and levied a fine and suffered a recovery, but to which the wife was no party, and Vandebendy for protection of the estate took an assignment of the term to trustees to secure the payment of the annuities and afterwards in trust to attend the inheritance, and also of an ancient statute that had been kept on foot. After Lord Bodmin's death, his lady brought a writ of Dower, to which the defendant pleaded the term; whereupon she filed her bill in equity to be let in to try her title at law, offering to discharge the trusts of the term, and prayed that the term might be made attendant on her Dower. The defendant insisted that he was a purchaser, and that he ought to

[*373] *have the benefit of this term and the statute, for the protection of his purchase; and upon the hearing before Lord Chancellor Jefferies (Hil. 1685,) it was chiefly argued by the defendant's counsel upon "the inconvenience that might ensue should relief be given in this case: that it would alter the course of conveyancing, and overthrow many purchases, it having been always looked upon as a good security to a purchaser, and a sufficient protection to his estate, where there was an ancient term kept on foot; and frequently in such cases, to avoid charges, they never insisted on a fine or common recovery; and if such a term should be set aside for a dowress, why not for any other incumbrance."(*w*) Upon the first hearing, the Lord Chancellor inclined to relieve the plaintiff. Upon a subsequent hearing, however, before Lord Chancellor Somers, in 1696, his lordship doubted whether he could relieve a dowress even against an heir at law, which was another case, but here there was a purchaser, and he could not assist the dowress against a purchaser,(*x*) and for that which was alleged that the defendant at the time of the purchase had notice of the plaintiff's right of Dower, so he had also notice of the lease, which was to protect it, and so that was nothing.(*y*) The plaintiff's bill was consequently dismissed, and thereupon she appealed to the House of Lords, where after solemn argument the decree of dismissal was affirmed.

From the printed reports of this case, the decision would seem to

(*u*) 1 Vern. 179, 356. 2 Ch. Ca. 172, and S. C. by the name of Radnor v. Rotheram, Pr. Ch. 65. 2 Freem. 211, and by that of Radnor v. Vandebendy. Show. P. C. 69.

(*v*) It is stated by Vernon that Lord Bodmin sold only the reversion after the death of Lord Warwick. If so, how could Lady Bodmin be dowable?

(*w*) 1 Vern. 358. (*x*) Pr. Ch. 66.

(*y*) 2 Freem 211.

have turned nearly as much upon *the doubts which then prevailed whether a dowress was entitled to the benefit of [*374] an attendant term *in any event*, as upon the particular circumstance of its being against a purchaser, and the court appears merely to have put it as making the case stronger against the dowress, that it was the case of a purchaser; but the later cases have referred Bodmin and Vandebendy exclusively to the latter ground,(*z*) and it is certainly upon that point only that it can be considered as law.

In Dudley v. Dudley, Sir John Trevor remarked, "I conceive that case purely to have been decreed in favour of a purchaser, and the strength of it to be grounded on the general inconveniences that would attend all purchasers *bonâ fide*, without notice, which was the point my Lord Jefferies and Somers went upon, and for which occasion was cited the case of Basset v. Nosworthy, 26 Car. 2, in Lord Nottingham's time, which was thus, Nosworthy pleaded himself a purchaser of valuable consideration without notice, which plea being proved, came to be heard upon the merits, and the Lord Chancellor declared, That a purchaser, *bonâ fide*, and without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage, or any other incumbrance; and if he can defend himself by those at law, his adversary shall have no help in equity to set those incumbrances aside, for equity will not disarm a purchaser; and precedents of this kind are very ancient and numerous, where the court has refused to give any assistance *against the purchaser either to the heir, or to the widow, [*375] the fatherless or to the creditors, or to one purchaser against another."(*a*)

The case of Radnor and Vandebendy was followed up by that of Swannock v. Lyford (1741),(*b*) before Lord Hardwicke; the judgment in which, as given from a very full note in one of Mr. Butler's annotations to Co. Litt. is too important to be omitted.

"Lord Chancellor.—Plaintiff's husband, being seised of a freehold estate, subject to a term of 1000 years standing out in a mortgagee, by virtue of a mortgage made by his father, conveys the inheritance to defendant for a valuable consideration; and at the time of the conveyance, defendant takes an assignment of the term in mortgage, in the names of trustees, to wait and attend upon such inheritance; and now the plaintiff brings her bill against defendant the purchaser, for Dower, praying to be admitted to redeem this mortgage term, and to have it out of the way; and upon payment of her proportion of the mortgage money, to be let into her Dower immediately, that she might not wait till the determination of the term. Question is, whether the court ought to decree this, under the present circumstances of the case? I cannot say but that the decree already made at the Rolls for plaintiff, the widow, is absolutely consistent with the mere reason of the thing, if it was now to be considered originally, and settled; but as this must [*376] depend not *only upon the precedents of the court, but the practice of conveying titles to estates, upon which the precedents themselves were settled, I do not wonder that a decree of this kind should

(*z*) See Pr. Ch. 243, 249. (*a*) Pr. Ch. 249.
(*b*) Ambl. 6. S. C. under the name of Hill v. Adams, 2 Atk. 208. But. Co. Litt. 208, *a*. n. (1.)

be made by a judge who was not absolutely conversant in such precedents of the court, and the distinctions taken therein. But upon consideration of them, and the great authority relied upon of Lady Radnor and Vandebendy, I am of opinion that the decree ought to be reversed. And if it should not, would it not be going directly contrary to that great authority, and the reasons upon which it is founded, and make such uncertainty in this court in regard to purchases, that the subject would not know what to rely upon? The wife here claims her Dower, subject to a term originally standing out in a mortgagee. The consequence of that is that in law, though she might have brought her writ of Dower, and recovered judgment, yet she could not have had the benefit of it, till after the determination of the term; for the judgment would be with a *cesset executio* till that time. This was the wife's legal remedy; and that being so, she comes into this court, upon the foundation of her general right of Dower, to be delivered from that restriction which the law imposes upon her, from having the benefit of it till such determination of the term, and to be admitted to redeem this term, which is now not in the hands of the mortgagee but of the purchaser, as being assigned to attend upon the inheritance, and for the other purposes before mentioned: and though the assignment is not in the words [*377] "to protect the inheritance from Dower, or mesne incumbrances," *yet it is always so understood; otherwise there would be no use in taking the term in the name of a trustee. It is admitted by the defendant, in case things had stood as they were at the time of the marriage, viz. that the term had been in the mortgagee, and the inheritance in the husband, as heir, or purchased from him by the purchaser without an assignment of the term, as here, the wife, as entitled to Dower, might then have come here to redeem the mortgage, to have the benefit of coming at her Dower immediately, by paying off the mortgage money, or keeping down the interest for the benefit of the heir or purchaser. And even this was (when originally settled) going a good way in favour of a dowress, though it was consistent with the reason of the thing; for, as she was entitled to Dower, and as a mortgage is only a redeemable interest, it is fit the equity of redemption should follow the nature of the interest in the estate; and she to be endowed, and the heir at law to be entitled to the inheritance subject to such Dower, was giving the wife a real benefit arising from her Dower, and not a mere nominal one, as it would be at law, where there is an outstanding term; for when the law says, she shall have judgment for Dower, but with a *cesset executio* till the determination of the term, that is in fact to say, she shall have no Dower, and therefore this court, as against the heir, but not the purchaser of the term and inheritance, gives her the benefit of her Dower, by removing the term. And if all the cases of tenancy in Dower and Curtesy likewise were now originally [*378] to be considered, it might as well be left upon the strength of the law, for it is *undoubtedly a mere legal title that the one has, as well as the other; and there is no contract of the party's intervening. Therefore, if a woman marries, and the husband is in possession of an estate, or if a man marries, and the woman is in possession of an estate, each party knows that at the time of the marriage their estates are liable and subject, on the one side, to a tenancy by the curtesy, and on the other, to Dower, and to all mesne incumbrances and

terms; and there is no harm to say, that both shall take their chance. The commiseration in respect to Dower, has arisen from the determinations in favour of tenancy by the curtesy; and indeed the distinction made between Dower and tenancy by the curtesy is founded upon very slight reasons; but, however, it has been so established. The great point, in this case, depends upon the determination in the case of Lady Radnor and Vandebendy. (Here his lordship stated the case.) There was great doubt in this court; and so in the House of Lords; and there was a great inclination in the house to reverse that decree of Lord Somers; but, when the counsel came to the bar, the Lords asked, whether it was usual for conveyancers to convey terms for years to attend the inheritance, to prevent Dower? and the counsel, with great candour, saying it was, the Lords confirmed Lord Somers' decree. The point that weighed in the judgment was, that this was the case of a purchase for valuable consideration; that, in making conveyances, purchasers relied upon that method of taking a conveyance of the inheritance to themselves, and an assignment of the term standing out to a trustee, to attend it; *that the out-standing term was prior to the title of Dower in the [*379] wife, and, therefore, purchasers have relied upon that as a bar to such Dower; so that this Court and House of Lords were of opinion that, if they were not to permit that to be so, it would be to overturn the general rule, which had been established and practised by many titles to estates, and tend to make such titles precarious for the future."——"Ever since this case it has always been said that the court is bound by it; and, on the other hand, I have heard it often said by the court that they will go no farther. And therefore, to have the benefit of a determination, every person's case must be exactly and strictly the same with that. I am of the same opinion too, and will not go any further than that case does. So that then the question comes to be this, whether there is any distinction between this case and that? It is said, that there the purchaser was allowed to protect himself, by taking in the term attendant upon the inheritance, because that was a satisfied term, which, in the consideration of this court, was become part of the fee; that he purchased the whole estate of the husband, and therefore an old term, such as that was, has been allowed to be so assigned, to protect the inheritance, but that in this case, the husband had nothing in the term, because he was owner of the inheritance subject to it, and of the equity of redemption of it; and for that at the time of the purchase, the term was in mortgage, and standing out, and the money advanced still due upon it; that it was a security separate from the husband's inheritance; and the purchaser took it from the mortgagee *only, and not from the husband. But I think that makes [*380] no difference here from that of Vandebendy. If there is any difference it is against the plaintiff, and makes the case much stronger in favour of the present purchaser. It is difficult to say, upon the state of the case, that the term there was a satisfied term at the time of the purchase. I rather think it was not; for Lord Somers states it, that the Earl of Warwick, who had the power of appointing the trust term, did appoint it by charging it with some annuities which were to commence a year after, and that some of them were continuing, and some of them determined, and, I think, after the purchase made; and if that was so, this

was not a satisfied term, but still subsisting to pay those annuities, which were incumbrances continuing upon the terms: so that Vandebendy, who took the assignment of the term, took it subject to the trust so continuing on it, in like manner as the purchaser here took the term, subject to the mortgage, and the money due thereon. Therefore the distinction endeavoured to be made between the case there being a satisfied term, and this being a mortgage term not satisfied, fails. But supposing the term had been satisfied, how would that make any difference? It is true, that would then have been a trust for the husband and his heirs, and he would have it as a part of his ownership and dominion over the estate, and consequently, it would be subject to Dower, as against the husband. For if the husband dies, and there is a satisfied term continuing, the wife would be entitled to come into this court against the heir, to set that term out of the way, in *order to have the benefit of her Dower; and that is expressly so said in the case of Banks and Sutton, 2 Wms. 700, by the master of the Rolls, and he cites a case to that purpose: and undoubtedly she would, without paying any thing. And if, in the present case, the husband had made no conveyance to the purchaser, and the mortgage had continued in the mortgagee, or his assignee, and the equity of redemption had descended on the heir, she would have been entitled likewise to Dower against him, by redeeming the term, and paying her proportion of the mortgage money, or by keeping down the interest. But if a term for years is in mortgage, and a person purchases the inheritance of the husband, and takes an assignment of the term from the mortgagee, by paying off the money, not only to have the trust of the term as a security, but to protect the inheritance so purchased, would it not be hard to take away the benefit of it from him? Shall it be said, that he shall have a less inheritance by taking in a mortgage term in that manner, by actually paying off the mortgage money, that if he had taken an old satisfied term, for which he never paid any thing? Therefore, if the term in Lady Radnor's case had been a satisfied one, that would have been so far from distinguishing that case from this in favour of the plaintiff, that it would have been rather stronger in favour of the purchaser, for here he paid a consideration for the outstanding term, and there nothing would have been paid for such satisfied term. But it is said, that this purchase of the mortgage was from the mortgagee, and not from the husband. If that was so, I do not know that this would make any difference, because the husband here *joined in the assignment of the mortgage. But what results from this case is, that it was part of the agreement of all the parties (the husband joining) that the term should be purchased in by the purchaser of the estate, to attend his inheritance; and that is the very trust declared by the deed. It has been admitted here, that if the husband had paid off the mortgage himself, after the coverture, and taken an assignment of the term in mortgage, in trust for him and his heirs, to attend the inheritance (in which case it would have then become a satisfied term;) and, after this, a purchaser had purchased from him, and paid him the whole money, and taken a conveyance of the inheritance from him, and an assignment of the term from the trustees, that would have been very well, and within the case directly of Lady Radnor. What is the difference then, in the reason of the thing, whether the husband pays off the mortgage himself,

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and takes an assignment of the term, in trust for himself and his heirs, and then sells to a purchaser the inheritance who takes the term from the trustees; or whether the purchaser comes, and purchases the inheritance from the husband, and pays off the mortgage, and takes an assignment of the term to himself; is the case the less strong for that? It is rather stronger.—It is admitted that if this had been an old satisfied term, standing out attendant upon the inheritance, and a purchaser had purchased from the husband, and had taken in this term, that would have protected the inheritance: That if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent *Dower. So [*383] if a man purchases an estate after coverture, and takes a conveyance to trustees, in trust for himself and his heirs, that will put an end to Dower: so, if he takes an estate in jointenancy, or a conveyance to himself for a long term of years. But it is objected, that, the act done here by the purchaser, at the time of his purchase, he having notice of the marriage, will put the wife in a worse condition than she would have been in originally, if the purchaser had not intervened; since then, there would have been a redeemable mortgage, (the equity of redemption being in the husband,) and the husband dying, she would have been entitled to redeem such mortgage, and then to have had Dower; and, therefore, by the purchaser's knowing of the title of Dower, by reason of the marriage, he would have put her into a worse condition, which, in equity, he ought not to have done; and this ought not to alter her right. But this does not differ from the common case. For, in this case, suppose the husband had before the purchase redeemed the mortgage, and taken an assignment of the mortgage term, in trust for himself and his heirs, to attend the inheritance, and, after that, the purchaser had purchased from him, and taken an assignment of such attendant term, in trust for him and his heirs, would not that have altered the wife's right to Dower, though without that intervention of the purchaser? She would be entitled to her Dower as against the heir; so likewise in case of an old term attending upon the inheritance in trust; but this purchase prevents the descent of the estate to the heir, and therefore it is not to be said, that the purchasers have put [*384] the wife in a *worse condition, by the intervention of their purchase; but, because conveyancers did rely upon the assignment of the term to trustees to protect the inheritance, as sufficient for that purpose, it was determined as had been mentioned; and I do not see how the present case can differ from that of an old term to attend the inheritance. But the present point is, that here the term was in the mortgagee, and the inheritance in the husband. The term will stand in the way of Dower at law, and the purchaser comes in upon that foot, pays his money, and relies upon that term to protect his purchase; and therefore, I think that is strictly within the reason of the case of Lady Radnor and Vandebendy, and all the other cases grounded upon it. Another distinction made is, that there is an express covenant taken from the husband against the Dower of his wife; for the covenant is, that the purchaser should enjoy the estate free from incumbrances, &c. and from all Dowers, &c. and particularly the Dower of the plaintiff; and then there is a covenant for farther assurance: and that this shows that the purchaser relied upon this covenant as his security to indemnify him

against Dower; and that it is plain, without question, this is notice of the Dower. A man may reasonably take a covenant against such right of Dower, and yet rely upon the security of the trust term besides, and may take such covenant against any damages, in respect to any suits by the wife for Dower. The purchaser did not purchase here subject to his wife's Dower, for he paid a price for the estate exclusive of it. If the estate in his hands had been subject to the Dower, then the covenant against it of the husband's would not have signified. But, [*385] however, be *that as it will, it is similar to that of Vandebendy; for there the purchaser took two statutes, (with defeazance) to indemnify the estate from incumbrances and the wife's Dower, and to suffer a recovery; and it was insisted upon there by the counsel, as it is here, but Lord Somers said, though a man does take such security, which he does to prevent any damages that may arise, yet that does not preclude him from any favour he is entitled to.—Therefore, upon the whole, I think the decree ought to be reversed, and the bill to be dismissed."

In the case of Wynn v. Williams,(*c*) the protection derived from an attendant term against Dower, in the case of a purchaser, was held to extend to a mortgagee, who, upon advancing his money, takes an assignment of the term. "It is perfectly established (said Lord Alvanley,) that a purchaser for valuable consideration from the owner of the equitable interest, may protect himself, though the owner could not, by the assignment of any outstanding terms. He might, therefore, protect himself against any demand she might have of Dower at law.(*d*) The decision is a very ancient one, and was affirmed in the House of Lords. Therefore, however questionable it *might* have been, it is now clear, that a purchaser, or a mortgagee, who is a purchaser *pro tanto*, though he knows of the right of Dower, may advance his money, and taking in a term, may *avail himself of it; though the consequence [*386] will be utterly defeating her right of Dower."(*e*)

It was said by Lord Somers, in Radnor v. Rotheram, that in case there had been any agreement that the wife should have had her Dower, that there the term should not have stood in her way;(*f*) and he cited a case of Barker and Fouke to that point, which does not appear to have been ever reported. The agreement intended, is, it is apprehended, agreement at the time of the purchase, so as to give the wife a special equity against the purchaser, contrary to the general rule of the court.

The circumstance that in Radnor and Vandebendy, and Swannock v. Lyford, the terms which afforded the protection to the purchasers were in both cases vested, at the time of the purchases, in the persons to whom they were originally limited, and charged in the one case with the annuities, and in the other with the mortgage debt, and that it was consequently necessary for the purchasers to take an assignment of those terms, in order to prevent the dowress from redeeming or satisfying them herself, which she might otherwise have done; and the emphasis

(*c*) 5 Ves. 130.

(*d*) [It is not necessary that the term should have been assigned for *this* purpose.]

(*e*) 5 Ves. 134.

(*f*) 2 Freem. 211. Pr. Ch. 66. So it was admitted, *arguendo*, in Radnor v. Vandebendy, that if any allowance had been made in the purchase, upon consideration of the title to dower, the same would have been a very material argument. Show. P. C. 72.

with which Lord Hardwicke, in the latter case, adverted, 'throughout the whole of his judgment, to the qualification that an assignment of the *term was indispensable in order to bring the purchaser within the protection to be afforded by that term, has introduced, in modern times, the doctrine, fortified at length by decision, that to exclude the dowress, the term must on every successive purchase be assigned to a new trustee, upon express trusts to attend the inheritance as vested in that purchaser; and that it is not enough that the term has once been assigned to attend. This doctrine will be found largely discussed in the case of Maundrell v. Maundrell,(g) from which the following passage is the more material part of Lord Eldon's judgment, when the case came before his lordship upon appeal.—"The next question is, whether a term having been once assigned to attend the inheritance, in a former transaction which touches the estate made the subject of a subsequent purchase, where the purchaser takes a conveyance of the inheritance, but does not deal in any manner with the term, he can say as against the widow, she is not entitled to Dower out of that inheritance, and upon this ground, that the term having been once assigned to attend the inheritance, is to be considered always as assigned to attend the inheritance, and the effect in law and equity is precisely the same as if that subsequent purchaser had got in the term, viz. as if he or his trustee had possessed themselves of the instrument creating the term, and made the trustees in whom it was vested parties to his conveyance, declaring that they would hold it for him, and to attend the inheritance purchased *by him.—I felt great difficulty, upon the argument, to make consistent, nor can I now make consistent with any rational principle, the doctrine that the purchaser shall be protected in the one case, and not in the other." His lordship then took a brief view of the general doctrine of attendant terms, and the protection afforded by them in general cases to purchasers, &c. without notice, and added: "With reference to that there is a distinction as to the dowress: a distinction that has prevailed upon no principle, but merely upon the practice of conveyancers; for in Lady Radnor v. Vandebendy, where, according to the note of Swannock v. Lifford, a term, not satisfied, had been declared expressly to attend the inheritance, one thing is clear, that the purchaser had notice that the individual of whom he purchased was married; and, therefore, that her inchoate title as dowress had attached upon the inheritance; consequently that the term when it should be satisfied, and before it was satisfied, subject to the purpose for which it was raised, was one in which the trustees had the legal estate to attend upon all the interests in the inheritance, the estate of the husband and the widow. If this were *res integra*, the proposition would be monstrous, that the purchaser, having notice of his right, and of the use that is made of a term outstanding by a court of equity, should buy in the term, and with full notice, not squeeze out any other incumbrance, but effectually displace the Dower. That proposition was thought and argued at the time of the decision of Lady Radnor v. Vandebendy, not to be very easily reconciled with the *ordinary principles of equity; but the House of Lords, upon the information given at the bar, and confirmed by Lord Somers, which, after

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(g) 7 Ves. 567. 10 Ves. 246.

reading that case and Swannock v. Lifford repeatedly, appears to me the true point of that decision, held that the term having been assigned in that contract of purchase, the purchaser was for that reason to be protected, and the authority is the stronger if the note of Swannock v. Lifford is correct, stating, that previously to the purchase in that case, and by an antecedent instrument, that very term was declared attendant upon the inheritance. There could not, therefore, be any difference in the reason of the thing, unless it turned upon the very fact, that there had been an actual assignment. In Swannock v. Lifford Lord Hardwicke says expressly, and the House of Lords had determined, that they would not go farther.

"Upon the whole I mean not to say, for it is impossible to say with confidence, that there is any great difference in principle upon the case of a dowress; that she stands as an owner of the inheritance contradistinguished from every other owner: so that though notice of the title will protect every other interest in the inheritance, it shall not protect her, and nothing shall protect her but the circumstance that the purchaser has omitted to take an assignment of the term to be attendant upon the inheritance *in that very transaction*; though the term has in a prior transaction been declared attendant upon the inheritance. But in the case of Swannock v. Lifford, Lord Hardwicke takes the House of Lords [*390] to have so decided; upon the *ground that in those very circumstances, and *that precise case*, the court is bound, not by a principle upon which it can well reason, but by a practice of conveyancers, found to be inveterate, that to that length it will go, and that it will not go farther. At least my opinion is, that the ground upon which the Master of the Rolls decided that part of the case is right, and therefore I confirm that."

It is understood in practice, that in order to protect a purchaser against Dower, the term must be actually assigned *before the death of the husband.*(*h*) This point, like most others connected with the present subject, rests more upon practical impression, than upon the reason of the thing. If law, it appears to have been wholly overlooked in the case of Wynn v. Williams, before mentioned, in which all the transactions were subsequent to the death of the husband, but the mortgagee, and subsequent purchaser, were held to be protected by the assignment of outstanding terms.

In practice, great difference of opinion exists as to the propriety of relying upon an assignment of an attendant term, as a security against titles of Dower. On account of the expense of levying a fine, or the difficulty of obtaining releases from the widows of former owners, the sufficiency of the term as a protection is generally contended for on the part of a vendor, and since the decision in Maundrell and Maundrell, a [*391] fine has been dispensed with in a great *number of cases, the purchaser contenting himself with taking an assignment of the term to his own trustee, and a bond of indemnity against Dower from the vendor. The present practice, however, seems to have a leaning towards insisting upon a fine in most cases, on the part of a purchaser, where the property is of any considerable value, although as to a mortgagee, the assignment of a term is usually considered sufficient.

(*h*) And see Walk. Princ. by Preston, 53.

It is frequently insisted by the counsel for a purchaser, that although the term does, while existing, afford an impediment to the successful prosecution of a claim of Dower, yet that the protection afforded by it is not such as can be relied upon by a purchaser to dispense with the necessity of a fine, inasmuch as the term is always liable to accidental and unintended merger, and the purchaser would, notwithstanding the existence of the term, still remain exposed to the harass and expense of defending a writ of Dower, since the term cannot be used as a bar to the action, but only to postpone the enjoyment under the judgment.(*i*) To the latter objection it has been replied, that should the widow be so ill advised as to prosecute her title of Dower at law, there can be little doubt that a court of equity, upon a disclosure of the real circumstances of the *title, would grant an injunction against [*392] the prosecution of the legal title, and would saddle the widow with the costs at law and in equity; and this opinion has been sanctioned by gentlemen of considerable eminence. But it may perhaps be going too far to consider it clear that a special protection, originally afforded upon the ground that if a dowress could get only an ineffectual and imperfect remedy at law, she should not be *aided* in equity against a purchaser, should be extended in the opposite direction, to restrain her from the prosecution of her legal remedy to that extent to which the law *would* carry it.

Whether or not under these circumstances a court of equity would compel a purchaser to accept the title without a fine from the vendor and his wife, has never been expressly decided, but in the case of Maundrell v. Maundrell, Lord Eldon incidentally threw out an opinion, that "the court *would* make the purchaser take the title, as the trustees might convey."(*k*)

In the subsequent case of Simpson v. Gutteridge,(*l*) Sir Thomas Plumer, V. Ch. appears to have been of the same opinion, observing, that "as it is admitted this term has been assigned in favour of these purchasers, it does away all the objections raised in the first exception, it being clear that no claim of Dower can be made against this purchaser."

It was not necessary, however, expressly to determine the point in this case, the wife having a jointure.

The observations upon the point above given *have not been altogether satisfactory to the profession,(*m*) and it may [*393] perhaps be permitted to entertain a doubt whether, whenever the case shall be thoroughly investigated, enough will not appear to induce the court to feel some scruples in compelling a purchaser to content himself with the protection afforded by an attendant term. Besides the objections made in practice, it might also be urged, that the common impression that judgment is given at law with *cesset executio* in every case where there is an existing term is exceedingly erroneous; for we have

(*i*) See Watk. Princ. by Preston, 52; and 3 Prest. Abst. 379, 405. It is objected too that the purchaser would be at the expense of keeping the term on foot (see Sugd. Vend. 281); but this objection cannot be considered as of much weight, since in consequence of the protection which they afford against other incumbrances, outstanding terms are, in modern practice, preserved with so much anxiety.

(*k*) 10 Ves. 262.

(*l*) 1 Madd. 618.

(*m*) And see Sugd. Vend. 302.

already seen, that the only case in which execution shall cease during the term, is where *no rent* is reserved upon the creation of the term, and that in all cases where there *is* a rent reserved, execution shall be awarded immediately, with a saving of the interest of the termor. As in almost all demises a pepper-corn rent at least is reserved, and as the wife will at law be endowed of that rent, it follows that she would gain execution of the freehold, and be entitled to exercise all those rights which might arise from the ownership of the freehold, so far as they were not inconsistent with the ownership under the term, which, in cases it is not impossible to conceive, might be the means of harassing the purchaser.

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THE END.

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